TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 121.

FREDERICK HOWARD, JAMES L. LOMBARD, AND JOHN C. GAGE, PLAINTIFFS IN ERROR,

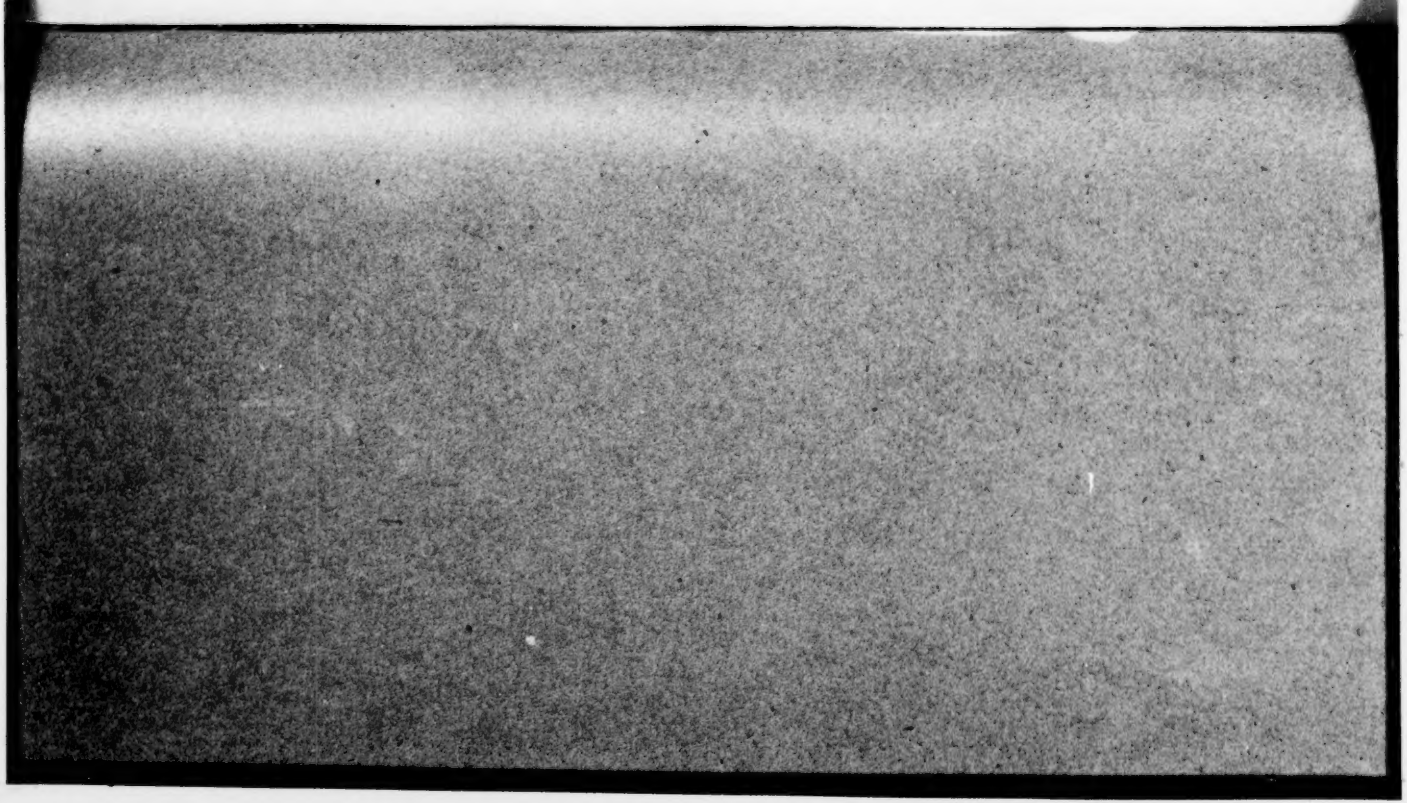
vs.

THE UNITED STATES TO THE USE OF DAVID D. STEWART.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JULY 31, 1900.

(17,851.)



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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1901.

a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1899, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the fourth day of December, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the eighth day of July, A. D. 1899, a transcript of record, in pursuance of a writ of error directed to the circuit court of the United States for the western district of Missouri, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case wherein Frederick Howard and others were plaintiffs in error and The United States to the use of David D. Stewart and Witten McDonald were defendants in error; which said transcript of record is in the words and figures following:

1 UNITED STATES OF AMERICA, *sct:*

To the United States to the use of David D. Stewart and Witten McDonald, Greeting.

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein Frederick Howard, James L. Lombard and John C. Gage are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the circuit court of the United States for the eighth circuit, this 3rd day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

AMOS M. THAYER,
Circuit Judge.

UNITED STATES OF AMERICA, } *ss:*
Western Division of the Western District of Missouri, }

We hereby acknowledge due service of the within citation this sixth day of June, A. D. 1899.

J. V. C. KARNES,
ALEXANDER NEW,
EDWIN A. KRAUTHOFF,
DAN'L B. HOLMES,
Attorneys for Defendants in Error.

2058. United States circuit court, western district of Missouri, western division. United States to the use of David D. Stewart *vs.* Frederick Howard, James L. Lombard, John C. Gage. Citation. Filed June 6, 1899. Adelaide Utter, clerk.

UNITED STATES OF AMERICA, *set:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the western division of the western district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court be-
2 fore you, at the April term, 1899, thereof, between The United States to the use of David D. Stewart, as plaintiff, and Frederick Howard, James L. Lombard, John C. Gage and Witten McDonald, as defendants, a manifest error hath happened, to the great damage of the said defendants Howard, Lombard and Gage as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 20th day of July, 1898, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court. Issued at office in Kansas City, this 3rd day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

ADELAIDE UTTER, *Clerk.*

Allowed this June 3rd, 1899.

AMOS M. THAYER,
Circuit Judge.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *set:*

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal

Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

of said circuit court of the United States for the western division of the western district of Missouri. Issued at office in Kansas City, this twenty-eighth day of June, A. D. 1899.

ADELAIDE UTTER, *Clerk.*

3 2058. United States circuit court, western district of Missouri, western division. United States to the use of David D. Stewart *vs.* Frederick Howard, James C. Lombard, John C. Gage. Writ of error. Filed June 6, 1899. Adelaide Utter, clerk.

UNITED STATES OF AMERICA, *set:*

Be it remembered that heretofore, to wit, on the 19th day of October, A. D. 1895, there was filed in the office of the clerk of the circuit court of the United States, for the western division of the western district of Missouri, a petition in a cause wherein The United States of America, to the use of David D. Stewart, is plaintiff, and Frederick Howard and others are defendants.

Said petition is in words and figures as follows:

In the Circuit Court of the United States within and for the Western Division of the Western District of the State of Missouri.

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart, Plaintiff,

vs.

FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS LOMBARD, and WITTEN MCDONALD, Defendants.

Plaintiff says that David D. Stewart is, and was at all the times hereinafter mentioned, a citizen and resident of the State of Maine, and the defendants and each of them are now, and at all the times hereinafter mentioned, were citizens and residents of the State of Missouri, and inhabitants of the western division of the western district thereof, and that the amount herein involved, exclusive of interest and costs, exceeds two thousand dollars.

Plaintiff further says that on March 3rd, 1887, one Warren Watson, and the defendants herein named, executed their writing obligatory, in which they acknowledged themselves to be held and firmly bound unto the United States of America, in the sum of twenty thousand dollars, lawful money of the United States, the condition of said obligation being that whereas the said Warren Watson had, pursuant to law, been appointed to be clerk of the circuit court of the United States, for the western division of the western district of Missouri; now if the said Warren Watson, by himself and by his deputies, should faithfully perform all the duties of the said office of the clerk, then said obligation to be void; otherwise to remain in full force and virtue. Plaintiff for a breach of said writing obligatory says that said Warren Watson did not faithfully perform all

4 the duties of said office of clerk in this, that on the — day of ——, 1890, the relator herein, D. D. Stewart, instituted an action in this court against Henry County. Said action was brought for the recovery of $2,500 and interest and costs. Thereafter, on the — day of March, 1891, said Henry County did deposit with said Warren Watson, as clerk of this court, under and pursuant to an order of said court to that effect, the sum of $2,525. Thereafter, on the — day of February, 1895, said action wherein D. D. Stewart was plaintiff and Henry County was defendant, coming on for trial, this court did order and adjudge that said D. D. Stewart was entitled to recover of said Henry County the sum of $2,525.00, and said court did further find that after the plaintiff, D. D. Stewart, had instituted said action, said Henry County had paid said sum of $2,525 to the clerk of the court for the use and benefit of plaintiff, and it further appearing to the court that the said sum of $2,525 so paid into court as aforesaid, was paid to and received by Warren Watson, the then clerk of this court, and that said Warren Watson had departed this life without having accounted for said sum of money so received by him as said clerk and that said (*said*) money had never been turned over to his successor in office the present clerk of this court, nor had the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it was found and adjudged by the court that said plaintiff, D. D. Stewart, was entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff, D. D. Stewart, was authorized to proceed therewith on the bond of said Warren Watson, given as clerk as aforesaid.

Plaintiff further says that neither said sum of $2,525 nor any part thereof, has ever been paid said David D. Stewart.

Wherefore, the United States of America at the relation of and to the use of David D. Stewart, prays judgment against the defendants, for said sum of $2,525, together with interest and costs.

KARNES, HOLMES & KRAUTHOFF,
Attorneys for Plaintiff.

Thereupon, on the same day, to wit, on the 19th day of October, A. D. 1895, a writ of summons was issued in the above-entitled cause, which writ, with the return of the marshal endorsed thereon, was filed on the 22nd day of October, 1895.

Said writ of summons is in words and figures as follows:

5 UNITED STATES OF AMERICA, }
Western Division of the Western District of Missouri, } *set:*

The President of the United States of America to the marshal of the United States for the western district of Missouri, Greeting:

You are hereby commanded to summon Frederick Howard, John Cutter Gage, James Lewis Lombard, and Witten McDonald, citizens of the State of Missouri and residents of the western division of the western district thereof to be and appear before the honorable circuit court of the United States, in and for the western division of

the western district of Missouri, on the first day of the next term thereof, to be begun and holden at Kansas City, in said district, on the first Monday, the 4th day of November next; then and there to answer to complaint of United States of America, at the relation of and to the use of David D. Stewart, a citizen and resident of the State of Maine, as set forth in the petition filed in the office of the clerk of said court, on the 19th day of October, A. D. one thousand eight hundred and ninety-five.

Hereof fail not and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 19th day of October, A. D. eighteen hundred and ninety-five. Issued at office in Kansas City, in said district, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] ADELAIDE UTTER, *Clerk.*

I hereby deputize C. W. Wenrich to execute this writ.
October 19th, 1895.

JO. O. SHELBY,
U. S. Marshal.

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *set:*

I do hereby certify that I served the within writ by delivering a true copy thereof together with a true copy of the petition in the cause to Jas. L. Lombard and by delivering a duly certified copy of this writ to Witten McDonald, and further executed said writ by delivering duly certified copies of the same to members of the families of Frederick Howard and Jno. Cutter Gage, over the ages of fifteen years and at their usual places of abode.

All done in the western division, western district of Missouri, on this 19th day of October, 1895.

JO. O. SHELBY,
United States Marshal,
By CHAS. W. WENRICH, *Deputy.*

6 Thereafter, to wit, on the 18th day of November, 1895, the following entry appears of record in the above-entitled case:

UNITED STATES *ex Rel.* STEWART
against
FREDERICK HOWARD ET AL. } 2058.

This day come the defendants and file demurrer to the petition herein.

Thereafter, to wit, on the 22nd day of November, 1897, the following entry appears of record in the above-entitled case:

UNITED STATES *ex Rel.* ——
against } 2058.
FREDERICK HOWARD ET AL.

Now on this day the demurrer to the petition being submitted to the court, is by the court overruled, to which action of the court the defendants except. Thereupon come the parties and file a stipulation waiving a jury herein, and it is ordered that defendant have three days within which to file answer.

Thereafter, to wit, on the 24th day of January, A. D. 1898, the following entry appears of record in the above-entitled case:

U. S. *ex Rel.* STEWART
against } 2058.
FREDERICK HOWARD ET AL.

This day come defendants by their attorneys and file answer. Said answer is in words and figures as follows:

In the United States Circuit Court in and for the Western Division of the Western District of Missouri, at Kansas City.

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart, Plaintiff,
vs.
FREDERICK HOWARD, JOHN CUTTER GAGE, James Lewis Lombard, and Witten McDonald, Defendants. } No. 2058. Answer.

Now come defendants and for answer to the petition of plaintiff, aver:

1. They deny each and every allegation in the petition contained, except as herein expressly admitted.

Upon March 3rd, 1887, Warren Watson was appointed clerk of the circuit court of the United States for the western division of the western district of Missouri, and acted as such from that date until his death, which occurred on the — day of ——, 1892.

7 Upon March 3rd, 1887, said Watson and these defendants executed the following instrument of writing:

Know all men by these presents: That we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the city of Kansas, county of Jackson, State of Missouri, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the said United States, to be paid to the said United States; for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Signed with our hands and sealed with our seals, this 3rd day of March, 1887.

The condition of the above obligation is such, — whereas, the said Warren Watson has, pursuant to law, been appointed to be clerk of the circuit court of the United States, for the western division of the western district of Missouri, as by order of appointment bearing date the 3rd day of March, 1887, and recorded on page 70 of Book Law "D" of the records of said court will more fully appear.

Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of said court, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed)	WARREN WATSON.	[SEAL.]
(Signed)	FREDERICK HOWARD.	[SEAL.]
(Signed)	JOHN CUTTER GAGE.	[SEAL.]
(Signed)	JAMES LEWIS LOMBARD.	[SEAL.]
(Signed)	WITTEN McDONALD.	[SEAL.]

No other instrument or bond was ever executed by these defendants with the said Watson or on his behalf.

Wherefore, defendants ask to be dismissed with costs.

2. Warren Watson died upon the — day of ——, 1892, while he was yet clerk of said court, as stated in paragraph 1 hereof. An administration was had upon his estate in the probate court of Jackson county, Missouri, having jurisdiction thereof. The notice required by statute for proving demands was given, but no demand has ever been made by D. D. Stewart, or any person on his behalf, or by the United States, or by any successor of said Watson, as clerk, for any money ever received by him, nor has any demand ever been made upon these defendants or any of them.

Wherefore defendants ask to be dismissed with costs.

3. They re-aver each allegation of paragraph 1 as if copied herein, and aver that the bond aforesaid was never intended to secure,
8 and never did secure, the said D. D. Stewart, or any individual. The United States has never assigned said bond to relator, nor in any way authorized him to make use of its name, nor to maintain any suit or action upon the said bond, and the said relator has no right or authority to maintain this action and the action is not upon behalf of the United States.

Wherefore defendants ask to be dismissed with costs.

4. They re-aver each allegation of paragraph 1 the same as if it was copied herein.

There was a case pending in said court wherein D. D. Stewart was plaintiff and Henry County was defendant. Any money paid or delivered to Warren Watson in said suit was by the voluntary act of the defendant therein, and by and with the consent of the plaintiff, relator herein, who, knowing all the facts, knowing just how the money was paid, made no objection thereto but permitted the same to remain in the hands of said Warren Watson, and any failure of the said Watson to pay over or account for any money so tendered or deposited, did not constitute a failure in the performance of any duty imposed upon him, nor did it constitute any breach of the con-

ditions in the bond aforesaid, and there has been no breach of any of the conditions of the said bond.

Wherefore defendants ask to be dismissed with costs.

C. E. SMALL,
SANFORD B. LADD,
FRANK HAGERMAN,
Attorneys for Defendants.

We consent to the filing of the foregoing answer this January 24th, 1898, as if filed within proper time.

KARNES, HOLMES & KRAUTHOFF,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA, }
Western Division of the Western District of Missouri, } *ss:*

Frederick Howard, John Cutter Gage and James Lewis Lombard on his own behalf and as the agent of Witten McDonald, each upon his oath doth say: The only bond or instrument of writing ever executed with Warren Watson or on his behalf, by the defendants in this case, was one, a copy of which is set forth in this answer, and the averments of the petition as to any other bond ever being executed are not true. Defendant, Witten McDonald, is outside of the jurisdiction of this court, and is not present to personally make this verification.

____ ____.
____ ____.
____ ____.

9 Subscribed and sworn to before me this 24th day of January, 1898.

____ ____,
Clerk of said Court.

Thereaf-er, to wit, on the 26th day of January, 1898, the following entry appears of record in the above-entitled case:

UNITED STATES to the Use of D. D. STEWART
against } 2058.
FRED. HOWARD ET AL.

This day come the parties by their attorneys and file stipulation; also comes plaintiff and files reply.

Said stipulation is in words and figures as follows:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri, at Kansas City.

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart, Plaintiff,
vs.
FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS Lombard, and Witten McDonald, Defendants. } No. 2058.

It is stipulated and agreed in the above-entitled case as follows:

1. That a trial by jury is waived.

2. That the case be submitted to Judge E. B. Adams now holding said court at Kansas City, on a statement of facts to be agreed upon or if any fact or facts cannot be agreed upon, then as to such either party may establish the same by depositions to be taken hereafter in the usual form.

3. Each party shall prepare and submit to the other a brief, and the party so receiving such brief may thereafter supplement his brief by any additional points or authorities and the whole case shall thus be submitted and thereupon, if either party so desire, the case shall be orally argued before Judge Adams at his chambers in St. Louis, Missouri, at such time as he may name.

4. When the statement of facts have been agreed upon, depositions taken if such be necessary, and briefs completed, the whole, with the pleadings shall be forwarded to Judge Adams, to be further disposed of as he may direct.

5. Either party may ask such declarations of law as he may wish, but copies of the same to be furnished to adverse party.

10 6. At any time before the briefs as aforesaid have been completed, either party may amend his pleadings in such way as he may choose.

FRANK HAGERMAN, *For Def'ts.*
KARNES, HOLMES & KRAUTHOFF,
Att'ys for Pl'ff.

Said reply is in words and figures as follows:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri, at Kansas City.

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart, Plaintiff,
against
FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS Lombard, and Witten McDonald, Defendants. } No. 2058.

The plaintiff, for reply to the answer of the defendants, says that a copy of the bond as set out in the first paragraph of defendants'

answer is correct, but plaintiff says that said bond was duly marked approved, and signed by A. Krekel, who was then judge of said court; and that the said parties to said bond duly qualified as to the amount of property owned by each, and which qualification of the several sureties was filed with said bond.

For reply to the second paragraph of said answer, the plaintiff asserting that he was not required to make proof of any claim against the estate of said Warren Watson, deceased, before he could assert his right in this case as against these defendants, alleges that the estate of the said Warren Watson was duly administered upon and closed in September, 1894, and long before plaintiff's right of action accrued as against these defendants; and except as thus admitted the plaintiff denies each and every allegation in said paragraph.

For reply to the third paragraph of said answer, the plaintiff denies each and every allegation therein contained.

For reply to the fourth paragraph of said answer, plaintiff admits that there was a case pending in said court wherein plaintiff was the plaintiff, and Henry County was defendant, but plaintiff denies each and every other allegation contained in said paragraph.

Wherefore plaintiff prays judgment as in his petition.

KARNES, HOLMES & KRAUTHOFF,
Attorneys for Plaintiff.

11 Thereafter, to wit, on the 15th day of February, 1899, the following entry appears of record in the above-entitled case:

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart *against* FREDERICK HOWARD ET AL.	2058.

Now on this day come the parties by their attorneys, the plaintiff by Mr. Edwin A. Krauthoff and the defendants by Messrs. Gage, Ladd & Small, and Mr. Frank Hagerman. Thereupon a stipulation in writing, waiving a jury, and an agreed statement of facts are filed, and this case coming on for hearing upon the pleadings and agreed statement of facts, the hearing of the same is proceeded with before the court without the intervention of a jury, and after hearing the arguments of counsel, the case is submitted to the court and taken under advisement.

Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE UNITED STATES OF AMERICA *ex Rel.* DAVID D. STEWART, Plaintiff,
vs.
FREDERICK HOWARD ET AL., Defendants.

It is stipulated and agreed between the parties hereto that a jury is hereby waived, and that this cause shall be tried and determined by the court without the intervention of a jury.

J. V. C. KARNES,
L. C. KRAUTHOFF,
NEW & KRAUTHOFF,
Attorneys for Plaintiffs.
GAGE, LADD & SMALL,
Attorneys for Defendant.

Said agreed statement of facts is in words and figures as follows:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

THE UNITED STATES OF AMERICA *ex Rel.* DAVID D. STEWART, Plaintiff,
vs.
FREDERICK HOWARD ET AL., Defendants.

Agreed Statement of Facts.

It is agreed between the parties hereto that the facts herein are as follows:

12 1. Upon March 3rd, 1887, Warren Watson was appointed clerk of the United States circuit court for the western division of the western district of Missouri, and acted as such from that date until his death, which occurred on the 24th day of March, 1892.

Upon March 3rd, 1887, Warren Watson, with these defendants, executed his bond as such clerk, in words and figures as follows:

Know all men by these presents, that we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the city of Kansas in the county of Jackson, State of Missouri, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the said United States, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Signed with our hands and sealed with our seals, this 3rd day of March, 1887.

The condition of the above obligation is such, whereas, the said

Warren Watson has, pursuant to law, been appointed to be clerk of the circuit court of the United States, for the western division of the western district of Missouri, as by order of appointment bearing date the 3rd day of March, 1887, and recorded on page 70 of Book "Law D" of the records of said court will more fully appear.

Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of said court, then this obligation to be void; otherwise to remain in full force and virtue.

WARREN WATSON. [SEAL.]
FREDERICK HOWARD. [SEAL.]
JOHN CUTTER GAGE. [SEAL.]
JAMES LEWIS LOMBARD. [SEAL.]
WITTEN McDONALD. [SEAL.]

Approved:
A. KREKEL, *Judge*.

This is the same bond mentioned in the petition and copied in the answer, and was the only bond ever executed by defendants or on behalf of Watson as such clerk. It was at the time of its execution approved by A. Krekel, a then judge of said court, who endorsed his approval thereon, and each of the parties to said bond qualified in writing as to the amount of property owned by each, which qualification was filed with said bond.

13 2. Warren Watson was a resident of Jackson county, Missouri, and while still acting as such clerk, died on the 24th day of March, 1892, and on the 2nd day of April, 1892, Fred W. Perkins was by the probate court of said county, duly appointed as his administrator and as such, on the 5th day of April, 1892, gave the notices required by the statutes of Missouri for the presentation of claims against said Watson's estate. On the 11th day of September, 1894, said estate having been completely administered upon, was closed and the administrator discharged. At no time did the United States or David D. Stewart, the relator, ever exhibit or present any demand or claim against said estate in said probate proceedings, or as provided by the laws of Missouri for exhibiting or presenting claims against the estates of decedents.

The amount of demands allowed against the estate of said Warren Watson and assigned to the fifth class is $2,730.91, and on this sum there was paid a dividend of 0331 per cent., or in the aggregate, $90.41 and no more.

3. On February 6th, 1891, the relator, David D. Stewart, as plaintiff, instituted in said United States circuit court his suit at law against Henry County, Missouri, in which his causes of action were set forth, in a petition containing three counts, the first asking a judgment for $1,010.00 with interest from the 1st day of September, 1887, on a bond of defendant for $1,000, dated July 1st, 1882, payable at the National Bank of Commerce of New York on July 1st, 1892, with six per cent. interest, evidenced by coupons, but at the option of the county, the bond was payable at any time after July 1st, 1887. The second count was upon a similar bond, for $1,000, and the third count was on a like bond for $500.00.

On March 3rd, 1891, defendant, Henry County, filed in said cause its answer, said answer as to each of the first and second counts being: that on September 6th, 1887, there was due on said bond $1,010.00 and on that date it deposited that sum in the National Bank of Commerce of New York, for the payment of the bond and interest, and on September 6th, 1887, tendered that sum to the plaintiff as full payment of the bond and interest thereon, but plaintiff refused to accept same, "and defendant says it has at all times been ready and willing to pay plaintiff said sum of $1,010.00 in full payment of said bond and unpaid interest and now here again tenders to plaintiff said sum of $1,010 in full payment of said bond and unpaid interest due thereon on September 6th, 1887, and now brings the said sum into court." The answer to the third count was exactly the same, except that the amount named was $505.00, instead of $1,010.00.

14 Upon March 3rd, 1891, there was entered on the records of said court the following:

"This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of $2,525.00 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein."

On June 27, 1891, the plaintiff in said suit filed his reply, which was a general denial.

On July 2, 1894, there was entered on the records of said court the following:

"This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court and by the court taken under advisement with leave to the parties to file briefs."

On February 11, 1895, there was entered on the records of said court the following:

A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel and taken under advisement by the court, and the court being now fully advised in the premises doth find the issues as follows, to wit: On the first count of the petition, the court finds that the principal and interest on bond No. 204 was duly tendered by defendant at the place of payment on the first day of September, 1887, and that after the plaintiff instituted this action in this court, and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of $1,010.00.

(The findings as to the second and third counts are precisely similar, except as to the amounts, the second count being $1,010.00 and the third $505.00.)

It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars ($2,525.00) the aggregate amount found to be owing to him under the three counts of the petition and that plaintiff pay the costs of this action and that execution issue therefor.

And it further appearing to the court that the said sum of $2,525.00 so paid into court as aforesaid, was paid and received by Warren Watson the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise. It is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Wa-son as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid. No appeal was taken from this judgment, and the same has become final and remains in full force and effect and unpaid.

4. On March 3rd, 1891, Henry County did hand to Warren Watson the sum of $2,525.00 as in said entry of that date recited.

No order or direction of the court as to this money was ever made, had or obtained and no entry in reference to the same was ever made, except as set out in paragraph 3.

When the $2,525.00 was so paid to said Warren Watson, he, on the same day, deposited the same in a bank to his own credit, and at no time did he treat the money as in the depository of the court. He never at any time presented any account to the court of such money, and has never paid it to Henry County or David D. Stewart and never during the pendency of the suit of Stewart *vs.* Henry County, did either party take any steps towards having any order made in relation to the said money, other than was actually made, nor make any objection to the method in which said money was received.

David D. Stewart had no knowledge of said acts of Warren Watson.

5. At no time was demand made on these defendants or Warren Watson for said money other than is to be inferred from the institution of the suit.

6. A jury is waived, and the answer of defendants shall be regarded as verified.

The above and foregoing are all the facts in the case and are to be taken subject to objections by either party as to their relevancy and competency.

J. V. C. KARNES,
L. C. KRAUTHOFF,
NEW & KRAUTHOFF,
For Plaintiffs.
FRANK HAGERMAN,
SANFORD B. LADD,
Att'ys for Defendants.

16 Thereafter, to wit, on the 17th day of April, 1899, the following answer and stipulation was filed in the above-entitled case:

In the Circuit Court of the United States within and for the Western Division of the Western District of the State of Missouri.

UNITED STATES *ex Rel.* STEWART
vs.
FREDERICK HOWARD ET AL. } No. 2058.

Now comes Witten McDonald, one of the defendants in the above-entitled cause, and for answer therein states that heretofore, to wit, on December 16, 1898, in the district court of the United States, within and for the southern division of the western district of Missouri, he was duly adjudged a bankrupt under the act of Congress relating to bankruptcy, and that thereafter, to wit, on April 6, 1899, he was by said court duly and fully discharged from all debts provable against his estate under said bankrupt act, except such debts as are excepted by law from such discharges, and that in and by said discharge from the debts provable against his estate as aforesaid, the said defendant, Witten McDonald, became and is fully discharged from all liability to the relator and plaintiff by reason of the matters and things complained of in the petition herein.

And this defendant having fully answered prays to be hence discharged with his costs.

DAN'L B. HOLMES,
Attorney for said Defendant.

The undersigned attorneys for the plaintiff in the above-entitled cause do hereby consent that the foregoing answer of Witten McDonald may be filed therein and do admit the truth of the statement in said answer of the adjudication of bankruptcy, by said McDonald, and of his discharge on April 6, 1899, from all debts provable against his estate under the act of Congress relating to bankruptcy, except such debts as are excepted by law from such discharges.

Kansas City, Mo., April 14, 1899.

E. A. KRAUTHOFF,
J. V. C. KARNES,
Attorneys for Plaintiff.

Thereafter, to wit, on the 25th day of April, 1899, an opinion was filed in the above-entitled cause.

Thereafter, to wit, on Wednesday, the 26th day of April, 1899, the same being a day of the regular April term of said court,
17 the following entry appears of record in the above-entitled cause:

THE UNITED STATES OF AMERICA at the Relation and to the Use of David D. Stewart
against
FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS Lombard, Witten McDonald. } 2058.

This case having been heretofore submitted to the court upon the pleadings and proofs in the form of an agreed statement of facts, a trial by jury having been duly waived by a stipulation in writing filed herein, now the court being fully advised in the premises doth at the request of defendants make and file a special finding of facts, the same being the facts so agreed upon and does find the issues for the plaintiff and against all of the defendants with the exception of Witten McDonald, and assesses the damages in the sum of $2,525.00 with interest thereon at six per cent. per annum from the date of the filing of the petition herein, to wit: October 19, 1895, making a total of $3,057.77. The court finds the issues in favor of said Witten McDonald.

It is therefore considered, ordered and adjudged by the court that said defendant, Witten McDonald, go hence without day and recover of David D. Stewart his costs herein laid out and expended and have thereof execution.

It is further considered, ordered and adjudged by the court that the United States of America, at the relation and to the use of David D. Stewart, recover of the defendants, Frederick Howard, John Cutter Gage, and James Lewis Lombard the sum of twenty thousand dollars, being the penalty of the bond in suit, to be satisfied by the payment of the sum of three thousand and fifty-seven dollars and seventy-seven cents ($3,057.77) the damages found to be due by the court and the costs of this action, and that execution issue therefor.

Said special finding of facts is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

UNITED STATES OF AMERICA at the Relation of and to the Use of David D. Stewart, Plaintiff,
vs.
FREDERICK HOWARD, JOHN CUTTER GAGE, JAMES LEWIS Lombard, and Witten McDonald, Defendants. } No. 2058.

Special Findings of Fact.

This cause came on for hearing on the written stipulation of the parties waiving a jury, and upon an agreed statement of facts,
18 and a separate stipulation as to defendant Witten McDonald. No other testimony was offered in the case.

Thereupon the court sitting as a jury, does, in accordance with said agreed statement of facts, and at the request of the counsel for the defendants, specially find the facts herein as follows:

1. Upon March 3, 1887, Warren Watson was appointed clerk of

the United States circuit court for the western division of the western district of Missouri, and acted as such from that date until his death, which occurred on the 24th day of March, 1892.

Upon March 3, 1887, said Warren Watson, with these defendants, executed his bond as such clerk, in words and figures as follows:

Know all men by these presents: That we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the city of Kansas — in the county of Jackson, State of Missouri, are held and firmly bound unto the United States of America, in the sum of twenty thousand dollars, lawful money of the said United States to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals, this 3rd day of March, 1887.

The condition of the above obligation is such, — whereas the said Warren Watson has, pursuant to law, been appointed to be clerk of the circuit court of the United States for the western division of the western district of Missouri, as by order of appointment bearing date the 3rd day of March, 1887, and recorded on page 70 of Book Law D of the records of said court will more fully appear.

Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of said court, then this obligation to be void; otherwise to remain in full force and virtue.

WARREN WATSON.	[SEAL.]
FREDERICK HOWARD.	[SEAL.]
JOHN CUTTER GAGE.	[SEAL.]
JAMES LEWIS LOMBARD.	[SEAL.]
WITTEN McDONALD.	[SEAL.]

Approved:
A. KREKEL, *Judge.*

This is the same bond mentioned in the petition and copied in the answer, and was the only bond ever executed by defend-
19 ants or on behalf of Watson as such clerk. It was at the time of its execution approved by A. Krekel, a then judge of said court, who endorsed his approval thereon, and each of the parties to said bond qualified in writing as to the amount of property owned by each, which qualification was filed with said bond.

2. Warren Watson was a resident of Jackson county, Missouri, and while still acting as such clerk, died on the 24th day of March, 1892, and on the 2nd day of April, 1892, Fred W. Perkins was by the probate court of said county, duly appointed as his administrator and as such, on the 5th day of April, 1892, gave the notices required by the statutes of Missouri for the presentation of claims against said Watson's estate. On the 11th day of September, 1894, said estate having been completely administered upon, was closed and the administrator discharged. At no time did the United States, or

David D. Stewart, the relator, ever exhibit or present any demand or claim against said estate in said probate proceedings, or as provided by the laws of Missouri for exhibiting or presenting claims against the estates of decedents.

The amount of demands allowed against the estate of said Warren Watson and assigned to the fifth class is $2,630.91 and on this sum there was paid a dividend of .0331 per cent. or in the aggregate $90.41 and no more.

3. On February 6, 1891, the relator, David D. Stewart, as plaintiff, instituted in said United States circuit court his suit at law against Henry County, Missouri, in which his causes of action were set forth in a petition containing three counts, the first asking a judgment for $1,010.00 with interest from the 1st day of September, 1887, on a bond of defendant for $1,000.00 dated July 1, 1882, payable at the National Bank of Commerce of New York on July 1, 1892, with 6 per cent. interest, evidenced by coupons, but at the option of the county the bond was payable at any time after July 1st, 1887. The second count was upon a similar bond for $1,000 and the third count was on a like bond for $500.00.

On March 3rd, 1891, defendant, Henry County, filed in said cause its answer, said answer as to each of the first and second counts being that on September 6th, 1887, there was due on said bond $1,010.00 and on that date it deposited that sum in the National Bank of Commerce of New York, for the payment of the bond and interest, and on September 6th, 1887, tendered that sum to the plaintiff as full payment of the bond and interest thereon, but plaintiff refused to accept same, "and defendant says it has at all times been ready and willing to pay plaintiff said sum of $1,010.00 in
20 full payment of said bond, and unpaid interest, and now here again tenders to plaintiff said sum of $1,010.00 in full payment of said bond and unpaid interest due thereon on September 6th, 1887, and now brings the said sum into court." The answer to the third count was exactly the same except that the amount named was $505.00 instead of $1,010.10.

Upon March 3rd, 1891, there was entered on the records of said court in said cause the following:

"This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of $2,525.00 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein."

On June 27th, 1891, the plaintiff in said suit filed his reply, which was a general denial.

On July 2, 1894, there was entered on the records of said court in said cause the following:

"This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court

and by the court taken under advisement with leave to the parties to file briefs."

On February 11, 1895, there was entered on the records of the said court in said cause the following:

"A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 *was* duly tendered by defendant at the place of payment on the first day of September, 1887, and that after the plaintiff instituted this action in this court and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of $1,010.00."

(The findings as to the second and third counts are precisely similar except as to the amounts, the second count being $1,010.00 and the third $505.00.)

It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-
21 five hundred and twenty-five dollars ($2,525.00), the aggregate amount found to be owing to him under the three counts of the petition, and that plaintiff pay the costs of this action, and that execution issue therefor.

And it further appearing to the court that the said sum of $2,525.00 so paid into court as aforesaid, was paid to and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid. No appeal was taken from this judgment, and the same has become final and remains in full force and effect and unpaid.

4. On March 3rd, 1891, Henry County did hand to Warren Watson the sum of $2,525.00 as in said entry of that date recited.

No order or direction of the court as to this money was ever made, had or obtained and no entry in reference to the same was ever made, except as set out in paragraph 3.

When the $2,525.00 was so paid to said Warren Watson, he on the same day, deposited the same in a bank to his own credit, and at no time did he treat the money as in the depository of the court. He never at any time presented any account to the court of such money, and has never paid it to Henry County or David D. Stewart, and never during the pendency of the suit of Stewart *vs.*

Henry County did either party take any steps towards having any order made in relation to the said money, other than was actually made, nor make any objection to the method in which said money was received.

David D. Stewart had no knowledge of said acts of Warren Watson.

5. At no time was demand made on these defendants or Warren Watson for said money other than is to be inferred from the institution of the suit.

The court further finds that the defendant, Witten McDonald, has been discharged of any obligation on his part to the plaintiff by reason of a discharge duly granted him by the United States
22 district court for the southern division of the eastern district of Missouri in bankruptcy; that said discharge was duly granted and said proceedings duly had.

Upon the finding of facts above made the court concludes as a matter of law that the relator is entitled to judgment against the defendants Howard, Gage and Lombard for the sum of $2,525.00 with interest at six per cent. from the date of the filing of the petition herein, October 19, 1895, a total of $3,057.77, and that defendant, Witten McDonald, is entitled to judgment in his favor.

Dated Kansas City, Missouri, April 26, 1899.

(Signed) ELMER B. ADAMS, *Judge*.

Thereafter, to wit, on the 2nd day of June, 1899, the following entry appears of record in the above-entitled case:

UNITED STATES *ex Rel.* STEWART
vs.
FREDERICK HOWARD ET AL. } 2058.

This day come defendants by their attorneys and file assignment of errors and application for writ of error.

Said assignment of errors (*are*) in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE UNITED STATES to the Use of DAVID D. STEWART, Plaintiff,
vs.
FREDERICK HOWARD, WITTEN McDONALD, JAMES L. LOMBARD, and JOHN C. GAGE, Defendants. } At Law.

The defendants in this action, Frederick Howard, James L. Lombard, and John C. Gage, in connection with their petition for a writ of error, make the following assignment of errors, which they aver occurred upon trial of the cause, to wit:

I. The court erred in entering judgment in favor of the plaintiff and against these defendants.

II. That upon the agreed statement of facts and upon the facts in

the case as found by the court, the judgment ought to have been in favor of these defendants and against the plaintiff, whereas said judgment was in favor of the plaintiff and against these defendants.

SANFORD B. LADD,
FRANK HAGERMAN,
Attorneys for said Defendants.

23 Said petition for writ of error is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

THE UNITED STATES to the Use of DAVID D. STEWART, Plaintiff, vs. FREDERICK HOWARD, WITTEN MCDONALD, JAMES L. LOMBARD, and JOHN C. GAGE, Defendants. } At Law.

Petition for Writ of Error.

Now come Frederick Howard, James L. Lombard and John C. Gage, defendants herein, and say that on or about the 26th day of April, 1899, this court entered judgment herein in favor of the plaintiff and against these defendants in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors which is filed with and attached to this petition.

Wherefore the defendants, Frederick Howard, James L. Lombard and John C. Gage pray that a writ of error may issue in this behalf to the United States circuit court of appeals, for the eighth circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said circuit court of appeals.

SANFORD B. LADD,
FRANK HAGERMAN,
Attorneys for said Defendants.

Defendant, Witten McDonald, declines to join in this petition.

DAN'L B. HOLMES,
Attorney for Witten McDonald.

The bond for writ of error, filed on the 6th day of June, A. D. 1899, is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

Know all men by these presents, that we, Frederick Howard, James L. Lombard and John C. Gage, as principal-, and Sanford B. Ladd and Edward F. Swinney, as sureties, are held and firmly bound unto the United States, to the use of David D. Stewart, in the

full and just sum of sixty-five hundred dollars, to be paid to the said United States to the use of David D. Stewart, his heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

24 Sealed with our seals and dated this — day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately, at the April term of the circuit court of the United States for the western division of the western district of Missouri, in a suit depending in said court between the United States to the use of David D. Stewart, plaintiff, and Frederick Howard, James L. Lombard and John C. Gage, defendants, judgment was rendered against the said defendants and the said defendants have obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing it and him to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said defendants shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good said plea, then the above obligation to be void, else to remain in full force and virtue.

FREDERICK HOWARD. [SEAL.]
JOHN C. GAGE. [SEAL.]
JAMES L. LOMBARD. [SEAL.]
SANFORD B. LADD. [SEAL.]
EDWARD F. SWINNEY. [SEAL.]

Signed and sealed in the presence of—

——— ———.
——— ———.
——— ———.

The above bond is hereby approved and ordered to be filed and made a part of the record.

(Signed) AMOS M. THAYER, *Judge.*

UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

Sanford B. Ladd, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth over and above all his debts and liabilities the sum of ten thousand dollars; and that he owns property to that amount, subject to execution, in the State of Missouri.

SANFORD B. LADD.

Subscribed and sworn to before me this twentieth day of May, A. D. 1899.

My term expires March 15th, 1903.

[SEAL.] SAMUEL R. HALSTEAD,
Notary Public, Jackson County, Mo.

25 UNITED STATES OF AMERICA, } ss:
Western District of Missouri, }

Edward F. Swinney, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth over and above all his debts and liabilities the sum of ten thousand dollars, and that he owns property to that amount, subject to execution, in the State of Missouri.

EDWARD F. SWINNEY.

Subscribed and sworn to before me this 23rd day of May, A. D. 1899.

Commission expires July 12, 1901.

C. G. HUTCHESON,
[SEAL.] *Notary Public, Jackson County, Mo.*

Said opinion, so filed as aforesaid, is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western Judicial District of Missouri.

THE UNITED STATES OF AMERICA at the Relation and to the Use of David D. Stewart, Plaintiff,
vs.
FREDERICK HOWARD ET AL., Defendants.

ADAMS, *District Judge:*

This is a suit instituted against the defendants as sureties on the official bond of the late Warren Watson as clerk of this court, to recover a sum of money alleged to have been deposited with him as such clerk by Henry County, Missouri, on the 3rd day of March, 1891, in a suit then pending in this court in which the relator was plaintiff and Henry County was defendant, and to have been afterwards embezzled by him.

The defences are two: First, that the relator is not authorized to sue on the bond in question because the United States of America is the sole obligee, and no statute of the United States authorizes a suit thereon at the relation or to the use of an individual; second, that the clerk did not take possession of the money tendered by virtue of his office as such clerk.

These two defences will be considered in the order stated. Section 795 of the Revised Statutes of the United States provides as follows:

"The clerk of every court shall give bond in the sum to be fixed and with sureties to be approved by the court which appoints him, faithfully to discharge the duties of his office, and seasonably
26 to record the decrees, judgments and determinations of the court of which he is clerk."

No language is here found which expressly authorizes any person who may be wronged by the act of the clerk to resort to this bond,

or to use the name of the obligee, the United States of America, in a suit on a bond to his use, for the redress of his wrong, but the question arises whether such right is given by necessary legal intendment.

The bond, with the condition as found in the statute, is the only one which can be required of a clerk of this court. United States *vs.* Tingey, 5 Pet., 115. It must be observed at the outset that this condition is comprehensive in its scope, and manifestly contemplates a security for the discharge, on the part of the clerk, of all such duties as the law imposes upon him. Among these duties are receiving, keeping and paying out money pursuant to the requirements of a statute or an order of court. Such duties are imposed by secs. 995, 996 of the Rev. Stat. of the United States. It is true the duty is imposed on the clerk, whenever he receives money, to forthwith deposit the same in the registry of the court, in the name and to the credit of the court, but it clearly appears from the statutes just referred to that it is made the duty of the clerk to receive money, to deposit money in the registry of the court, and to pay it out only as and when ordered by the court. For the faithful performance of these duties and each of them, the bond is required of the clerk, and the sureties on such bonds become the clerk's sponsors therefor. Now, it is well known both from the character of the jurisdiction conferred upon circuit courts, as well as from the practical administration and exercise of such jurisdiction, that the money involved in litigation in such courts belongs almost exclusively to individual suitors and rarely ever to the United States. It is the district court which affords the usual jurisdiction for asserting the rights or redressing the wrongs of the United States as such. So far as clerks of circuit court- are concerned, their duties, with respect to receiving, depositing and paying out money, concern mainly individual suitors other than the United States. The condition of the bond in question should therefore be construed in the light of these facts, and when legislative authority is conferred to require from a clerk a bond conditioned for the faithful discharge of his duties, it is not doubted that the legislature intended that the obligation of such bond should have relation at least to that duty which above all others requires a guaranty for its faithful performance, namely, the faithful accounting for moneys which may come into the clerk's hands by virtue of his office. Such duties and obligations
27 being imposed upon the clerk, the bond required of him ought, if possible, to be commensurate therewith.

It is held in the case of Washington *ex rel.* McCue *vs.* Young, 10 Wheat., 406, that no person can be authorized to use the name of another without his assent, given in fact or by legal intendment. It is my opinion that, in imposing upon clerks of the circuit court the duties above alluded to, which so necessarily and vitally affect the interests of suitors in its courts, and in requiring from such clerk a bond for the faithful discharge of such duties,—the United States, by necessary legal intendment, thereby consents to the use of its name by suitors wronged by official misconduct of the clerk, in a suit against the clerk or his sureties on his official bond. This im-

plied authority or necessary legal intendment becomes the more apparent when it is considered that the clerk's office is an agency of the United States Government, ordained and established for the use and convenience of its people. The money entrusted to its clerk, is, in a large sense, money which the Government has undertaken to keep for its people. When, therefore, the clerk, by official misconduct, embezzles or misappropriates such money, even though perhaps the Government may not be subjected to a suit for its recovery, it clearly owes a highly moral and meritorious obligation to the loser, in the nature of a responsibility for the act and misconduct of its agent, and one which the National Congress might regard as sufficient to move it to a private act for his relief.

Considering all these things, it seems unreasonable to say that all Congress intended, by providing for a bond from clerks of the circuit court, was to secure the United States itself against damage by official misconduct. On the contrary, the language of the act, con-trued in the light of the duties imposed upon the clerk, and in the light of the obligations of the United States in the performance of its governmental functions, connected therewith, conduce plainly to the result that such bond is intended for security for all suitors in this court, and being so intended, an implied authority necessarily arises permitting such suitor to put the bond in suit in the name of the United States to his use, for the redress of wrongs within the purview of the bond.

The next question to be considered is whether Clerk Watson had the money in question in his possession by virtue of his office as clerk. It is contended that it was entrusted to him by Henry county to keep good a tender before that time made, and much research and learning have been exhibited to show that this was but a private or personal transaction between the clerk, as an individual, and
28 Henry county, and that the money was never *in custodia legis*, and never in the hands of the clerk by virtue of his office. It is contended that the statutes of the State of Missouri, secs. 2937 and 2939, in relation to tender, have no application, under the Federal Statutes in relation to costs, and the practice in the Federal court, to the facts of this case. To all these suggestions and to all the authorities relied upon, I have given attentive consideration, but there is one view of the facts, which in my opinion is conclusive of the question now under consideration. The money appears to have been received by the clerk with such sanction of the court as, in my mind, is equivalent to an order to that effect made by the court. The facts disclosed by the agreed statement are as follows:

Henry county having, before the suit was brought against it by Stewart, made a tender of a certain amount in full satisfaction of the cause of action sued upon, when it came to answer the petition of Stewart in this court, alleged as follows: "And defendant says it at all times has been ready and willing to pay plaintiff said sum ($2,525) and now here again tenders to plaintiff said sum in full payment of said bonds and unpaid interest due thereon, * * * and now brings the said sum into court." This answer was filed on March 3, 1891. On the same day there was entered on the records

of the court the following: "This day comes defendant by its attorney and files answer and tenders to plaintiff and deposits with the clerk the sum of $2,525.00 in payment and satisfaction of his cause of action in the petition set forth." It further appears as a fact that on said 3rd day of March, 1891, Henry county did hand to Warren Watson, clerk, the sum of $2,525.00 as in said pleading and entry of record stated. It further appears that after reply was filed in due course, and on July 2, 1894, the following proceedings were had in said cause, a jury having been waived the hearing was proceeded with, the evidence heard and the cause submitted to the court, and afterwards, on February 11, 1895, the following further proceedings were had and entered of record in said cause, that is to say:

"A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and arguments of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 was duly tendered by defendant at the place of payment on the 1st day of September, 1887, and that after the plaintiff instituted this action in this court and at the filing of the
29 answer herein, the defendant duly paid said sum into court for the use and benefit of the plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of $1,010.00." (The findings as to the second and third counts are precisely similar to the one just now quoted, except as to the amounts, the second count being for $1,010.00, and the third being for $505.00.) The judgment of the court after finding such facts, proceeds as follows: "It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of $2,525.00, the aggregate amount found to be owing him under the three counts of the petition, and that the plaintiff pay the costs of this action, and that execution issue therefor. And it further appearing to the court that the said sum of $2,525 so paid into court as aforesaid, was paid to and received by Warren Watson the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk aforesaid."

The authorities show, and it is conceded to be the law governing this case, that the money in question must have been delivered to the clerk by some direction of the court, in order to be so in his possession by virtue of his office as to render his sureties liable for its misapplication, but I cannot construe the facts set forth above as they appear in the pleadings, record and judgment in the case of Stewart *vs.* Henry County, without being brought irresistibly to the

conclusion that said money was paid to the clerk with such sanction of the court at the time, as is equivalent to an express order to that effect. It is common knowledge that the record book is the mouthpiece of the court; it is under the direct control of the court, and no entry is made without the sanction of the court. In fact, it appeared affirmatively at the hearing of this case, that the record proceedings on March 3, 1891, showing a deposit of the money in question with the clerk was signed by the judge of the court. The subsequent record entries in the case show that the court at all times regarded the money as under its control. It would be sticking in the back, ignoring altogether the substance of things, to hold that the record in that case does not disclose the taking of the money in question into judicial custody. But it is said that under the statutes of the United States, secs. 995 and 996, it is not lawful to deposit money with the clerk, and that therefore Clerk Watson did not have possession of the money in question under the law, and hence not at all. Section 995 reads as follows: "All moneys paid into any court of the United States or received by the officers thereof in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer or assistant treasurer or a designated depositary of the United States, in the name and to the credit of such court." Sec. 996 reads as follows: "No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges and to be entered and certified of record by the clerk, and every such order shall state the cause in or on account of which it is drawn."

These sections clearly deal with the custody of money after the same may have been received by the officers of the court. In other words, they cannot be construed as a prohibition upon receiving money by the officers of the court. The very language of section 995 makes this clear. It refers to moneys which may be "received by the officers" of the court. This is further made clear by the fact that the court acts alone through its officers, and I know of no method of taking money into legal custody except by and through the instrumentality of the court's officers. It is common practice, when the court is about to take money into judicial custody to order it paid to the clerk. His duty then arises under section 995 above quoted, to deposit it forthwith in the registry of the court. If he fails to do so, he violates his duty, and this is exactly what Clerk Watson did. On receipt of the money in question, he was required by law to forthwith deposit it in the registry of the court. Instead of doing so, he deposited it to his individual credit in some bank where he was keeping his individual account. He thereby violated the law, failed to perform his duty as clerk, and his subsequent use of the money for his own private purposes, is but further evidence of his subversion of the same to his own use. When the court subsequently rendered final judgment in the case of Stewart *vs.* Henry County, it practically ordered this money to be paid to the plaintiff. The right to said money and all legal remedies for the enforcement of the right, were thus vested in the plaintiff. It may or may not

be, as claimed by defendants' counsel (as to which I express no opinion), that plaintiff has a present subsisting right enforceable against Henry county for the payment of his judgment. The assertion of such right, if it exists, would be grossly inequitable, and the court is not inclined to so rule this case as to unnecessarily invite such proceeding.

It results that plaintiff is entitled to judgment for the penalty of the bond, with an assessment of damages in the sum of
31 $2,525.00 with interest thereon from the date of the institution of this suit at the rate of six per cent. per annum.

UNITED STATES OF AMERICA, *sct:*

I, Adelaide Utter, clerk of the circuit court of the United States, for the western division of the western district of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, assignment of errors and all proceedings in the case entitled United States *ex rel.* Stewart *vs.* Frederick Howard *et al.*, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said circuit court. Done at office in Kansas City, Missouri, this 28 day of June, A. D. 1899.

Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

ADELAIDE UTTER, *Clerk.*

[Cancelled 10c. U. S. rev. stamp.]

Filed Jul- 8, 1899.

JOHN D. JORDAN, *Clerk.*

32 And on the eighth day of July, A. D. 1899, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

FREDERICK HOWARD ET AL., Plaintiffs in Error,
vs.
UNITED STATES to the Use of DAVID D. STEWART ET AL. } No. 1288.

The clerk will enter my appearance as counsel for the plaintiffs in error.

SANFORD B. LADD.
FRANK HAGERMAN.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1288. Frederick Howard *et al.*, plaintiffs in error, *vs.* United States to the use of David D. Stewart *et al.* Appearance. Filed Jul- 8, 1899. John D. Jordan, clerk. Sanford B. Ladd, Frank Hagerman, counsel for pl'ffs in error.

And on the fourth day of August, A. D. 1899, an appearance of counsel for defendant in error Stewart was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

FREDERICK HOWARD ET AL., Plaintiffs in Error,
vs.
THE UNITED STATES to Use of DAVID D. STEWART and Witten McDonald. } No. 1288.

33 The clerk will enter *my* appearance as counsel for the defendant in error David D. Stewart.

J. V. C. KARNES.
ALEXANDER NEW.
EDWIN A. KRAUTHOFF.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1288. Frederick Howard *et al.*, plaintiffs in error, *vs.* The United States to use of David D. Stewart *et al.* Appearance. Filed Aug. 4, 1899. John D. Jordan, clerk. J. V. C. Karnes, Alexander New, Edwin A. Krauthoff, counsel for defendant in error David D. Stewart.

And on the fourth day of August, A. D. 1899, an appearance of counsel for defendant in error McDonald was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

FREDERICK HOWARD ET AL., Plaintiffs in Error,
vs.
THE UNITED STATES to Use of DAVID D. STEWART and Witten McDonald. } No. 1288.

The clerk will enter my appearance as counsel for the defendant in error Witten McDonald.

DAN'L B. HOLMES.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1288. Frederick Howard *et al.*, plaintiffs in error, *vs.* The United States to use of David D. Stewart *et al.* Appearance. Filed Aug. 4, 1899. John D. Jordan, clerk. Daniel B. Holmes, counsel for defendant in error Witten McDonald.

34 And on the eighth day of January, A. D. 1900, in the record of the proceedings of said circuit court of appeals, is an entry in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *January* 8, 1900.

FREDERICK HOWARD ET AL., Plaintiffs in Error,
vs.
THE UNITED STATES to the Use of DAVID D. Stewart *et al.* } No. 1288.

In error to the circuit court of the United States for the western district of Missouri.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Frank Hagerman in behalf of the plaintiffs in error, but, not being concluded at the hour of adjournment, the further hearing of this cause was postponed until tomorrow morning.

And on the ninth day of January, A. D. 1900, in the record of the proceedings of said circuit court of appeals, is an order of submission in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

TUESDAY, *January* 9, 1900.

FREDERICK HOWARD ET AL., Plaintiffs in Error,
vs.
THE UNITED STATES to the Use of DAVID D. Stewart *et al.* } No. 1288.

In error to the circuit court of the United States for the western district of Missouri.

This cause having been called this day for further hearing, argument was continued by Mr. Frank Hagerman for the plain-
35 tiffs in error and concluded by Mr. Edwin A. Krauthoff for the defendant in error. Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the ninth day of April, A. D. 1900, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

36 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1899.

FREDERICK HOWARD, JAMES L. LOMBARD, and JOHN C. GAGE, Plaintiffs in Error,
vs.
THE UNITED STATES to the Use of David D. Stewart and Witten McDonald, Defendants in Error.

No. 1288. In Error to the Circuit Court of the United States for the Western District of Missouri.

Mr. Frank Hagerman (Mr. Sanford B. Ladd and Mr. Willard P. Hall were with him on the brief) for plaintiffs in error.

Mr. Edwin A. Krauthoff (Mr. J. V. C. Karnes, Mr. Alexander New and Mr. David D. Stewart were with him on the brief) for defendants in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

By stipulation in writing the parties waived a jury and tried this action before the court on the following agreed statement of facts:

"It is agreed between the parties hereto that the facts herein are as follows:

"1. Upon March 3rd, 1887, Warren Watson was appointed clerk of the United States circuit court for the western division of the western district of Missouri, and acted as such from that date until his death, which occurred on the 24th day of March, 1892.

"Upon March 3rd, 1887, Warren Watson, with these defendants, executed his bond as such clerk, in words and figures as follows:

"Know all men by these presents that we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the city of Kansas in the county of Jackson, State of Missouri, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars, lawful money of the said United States to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally firmly by these presents.

"Signed with our hands and sealed with our seals, this 3rd day of March, 1887.

37 "The condition of the above obligation is such, whereas, the said Warren Watson has pursuant to law, been appointed to be clerk of the circuit court of the United States, for the western division of the western district of Missouri, as by order of appointment bearing date the 3rd day of March, 1887, and recorded on page 70 of Book 'Law D' of the records of said court will more fully appear.

"Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of

said court, then this obligation to be void; otherwise to remain in full force and virtue.

WARREN WATSON. [SEAL.]
FREDERICK HOWARD. [SEAL.]
JOHN CUTTER GAGE. [SEAL.]
JAMES LEWIS LOMBARD. [SEAL.]
WITTEN McDONALD. [SEAL.]

"Approved:
A. KREKEL, *Judge.*

"This is the same bond mentioned in the petition and copied in the answer, and was the only bond ever executed by defendants or on behalf of Watson as such clerk. It was at the time of its execution approved by A. Krekel, a then judge of the said court, who endorsed his approval thereon, and each of the parties to said bond qualified in writing as to the amount of property owned by each, which qualification was filed with said bond.

"2. Warren Watson was a resident of Jackson county, Missouri, and while still acting as such clerk, died on the 24th day of March, 1892, and on the 2nd day of April, 1892, Fred W. Perkins was by the probate court of said county, duly appointed as his administrator and as such, on the 5th day of April, 1892, gave the notices required by the statutes of Missouri for the presentation of claims against said Watson's estate. On the 11th day of September, 1894, said estate having been completely administered upon, was closed and the administrator discharged. At no time did the United States or David D. Stewart, the relator, ever exhibit or present any demand or claim against said estate in said probate proceedings, or as provided by the laws of Missouri for exhibiting or presenting claims against the estates of decedents.

"The amount of demands allowed against the estate of said Warren Watson and assigned to the fifth class is $2,730.91, and on this sum there was paid a dividend of 0.331 per cent., or in the aggregate, $90.41 and no more.

"3. On February 6th, 1891, the relator, David D. Stewart, as plaintiff, instituted in said United States circuit court his suit at law against Henry County, Missouri, in which his causes of action were set forth, in a petition containing three counts, the first asking a judgment for $1,010.00 with interest from the 1st day of September, 1887, on a bond of defendant for $1,000, dated July 1st, 1882, payable at the National Bank of Commerce of New York on July 1st, 1892, with six per cent. interest, evidenced by coupons, but at the option of the county, the bond was payable at any time after July 1st, 1887. The second count was upon a similar bond, for $1,000, and the third was on a like bond for $500.00.

38 "On March 3rd, 1891, defendant, Henry County, filed in said cause its answer, said answer as to each of the first and second counts being that on September 6th, 1887, there was due on said bond $1,010.00 and on that date it deposited that sum in the National Bank of Commerce of New York, for the payment of the bond and interest, and on September 6th, 1887, tendered that sum

to the plaintiff as full payment of the bond and interest thereon, but plaintiff refused to accept same, 'and defendant says it has at all times been ready and willing to pay plaintiff said sum of $1,010.00 in full payment of said bond, and unpaid interest, and now here again tenders to plaintiff said sum of $1,010.00 in full payment of said bond and unpaid interest due thereon on September 6th, 1887, and now brings the said sum into court.' The answer to the third count was exactly the same except that the amount named was $505.00 instead of $1,010.00.

"Upon March 3rd, 1891, there was entered on the records of said court the following:

"'This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of $2,525.00 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein.'

"On June 27, 1891, the plaintiff in said suit filed his reply, which was a general denial.

"On July 2, 1894, there was entered on the records of said court the following:

"'This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court and by the court taken under advisement with leave to the parties to file briefs.'

"On February 11, 1895, there was entered on the records of said court the following:

"'A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 *was* duly tendered by defendant at the place of payment on the first day of September, 1887, and that after the plaintiff instituted this action in this court and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff, and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of $1,010.00.'

"(The findings as to the second and third counts are precisely similar except as to the amounts, the second count being $1,010.00 and the third $505.00.)

"'It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars ($2,525.00), the aggregate amount found to be owing to him under the three counts of the petition and that plaintiff pay the costs of this action, and that execution issue therefor.

39 "'And it further appearing to the court that the said sum of $2,525.00 so paid into court as aforesaid, was paid and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk or otherwise, it is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid.' No appeal was taken from this judgment, and the same has become final and remains in full force and effect and unpaid.

"4. On March 3rd, 1891, Henry County did hand to Warren Watson the sum of $2,525.00 as in said entry of that date recited.

"No order or direction of the court as to this money was ever made, had or obtained and no entry in reference to the same was ever made, except as set out in paragraph 3.

"When the $2,525.00 was so paid to said Warren Watson, he, on the same day, deposited the same in a bank to his own credit, and at no time did he treat the money as in the depository of the court. He never at any time presented any account to the court of such money, and has never paid it to Henry County, or David Stewart and never during the pendency of the suit of Stewart *vs.* Henry County did either party take any steps toward having any order made in relation to the said money, other than was actually made, nor make any objection to the method in which said money was received.

"David D. Stewart had no knowledge of said acts of Warren Watson.

"5. At no time was demand made on these defendants or Warren Watson for said money other than is to be inferred from the institution of the suit.

"6. A jury is waived, and the answer of defendants shall be regarded as verified.

"The above and foregoing are all the facts in the case and are to be taken subject to objections by either party as to their relevancy and competency."

On consideration of the agreed statement of facts, the circuit court found the issues for the relator, and rendered a judgment against the defendants for the amount claimed. The opinion of the learned trial judge is reported in 93 Fed. Rep., 719. The defendants sued out this writ of error.

CALDWELL, circuit judge, delivered the opinion of the court:

The first contention of the plaintiff in error is that the bond required to be given by a clerk of the United States circuit court is intended "solely for the protection of the United States and not at all for the protection of private suitors."

From the organization of the judicial system of the United States

the condition of the clerk's bond has been the same. The judiciary act of 1789 required the clerk to "give bond with sufficient sureties to the United States in the sum of $2,000 faithfully to discharge the duties of his office and seasonably to record the decrees, judgments
40 and determinations of the court of which he is clerk." As the business in these courts increased, provision was made by which the penalty of the bond could be correspondingly increased. By section 795 of the Revised Statutes of the United States, the penalty of the bond was "to be fixed by the court," and by the later act of February 22, 1875, 18 U. S. Stat., ch. 95, sec. 1, p. 333, the penalty of the bond is fixed at "not less than $5,000 and not more than $20,000, to be determined and regulated by the Attorney General of the United States." Very curiously, section 795 of the Revised Statutes omitted to name any obligee in the bond; this omission, however, in no manner affected the validity of the bond, for with or without a named obligee the bond was a valid security to any one injured by a breach of its conditions. Carnegie, Phipps & Co. (Limited) *v.* Hulbert, 36 U. S. App., 81. This omission was remedied by the act of 1875, which requires the bond to be given "to the United States," as did the judiciary act of 1789, but the condition of the bond has remained the same under all the acts. If the contention of the plaintiff in error is sound, that the bond is intended "solely for the protection of the United States and not at all for the protection of private suitors," then no act on the part of the clerk in the discharge of his official duties which results in loss or injury to a private suitor in the court, would render him liable therefor in his official capacity. He might with impunity refuse "to record the decrees, judgments and determinations of the court" in favor of private suitors without incurring official responsibility on himself, or imposing liabitity on his sureties for such neglect of duty. If the statute was made to express the construction contended for, the condition would read "faithfully to discharge the duties of his office so far forth as they concern the United States only, and seasonably to record the decrees, judgments and determinations of the court in cases in which the United States only is interested." Obviously, the court cannot engraft any such limitations on the conditions of the bond. The United States is named as the obligee in the clerk's bond as is done in the case of the marshal's bond and the bonds of other officers of the United States, but the bond is given for the indemnity of any one—the United States no more than any private suitor—who suffers loss through his official misconduct or delinquency—any one suffering loss by the breach of the covenant of his bond "faithfully to discharge the duties of his office." This comprehensive condition embraces every duty and obligation imposed on him by law or the lawful order, usage and practice of the court. Grady *v.* United States, 98 Fed. Rep., 238. Section 985 of the Revised Statutes of the United States provides:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States,

in the name and to the credit of such court: Provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court." When a clerk receives money in his official capacity he does not "faithfully discharge his duty" in respect to such money unless he "forthwith" deposits it in conformity with the requirements of this section. And much less does he comply with the obligation of the
41 bond when he not only fails to deposit it as required by law, but fails to produce and pay it over to the party entitled to it under the order of the court. The section quoted has been the law since 1817 (act March 3, 1817, 3rd Statutes, 39) save in the name of the depositories. The statutes of the United States plainly contemplate that the clerk will receive in his official capacity moneys belonging to private suitors. Provision is made for loaning out moneys in the registry of the court "according to the agreement of the parties," and the parties here meant are private suitors, as the Government does not loan her money in this way. The moneys belonging to the United States arising under the internal-revenue laws of the United States which come into the hands of the clerk, are required to be paid to the collector of internal revenue for the district (section 3216 Revised Statutes; Instructions of Attorney General 133) and all other moneys coming into the hands of the clerk belonging to the United States are required to be "promptly covered into the treasury," *ib.* Section 798, Revised Statutes, provides:

"At each regular session of any court of the United States, the clerk shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited, and in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court." This section is a re-enactment of a similar section of the act of 1817. It is apparent from the provisions of this section that Congress was cognizant of the fact that clerks were constantly receiving and disbursing in their official capacity moneys in causes pending in court between private suitors. This is still more plainly shown by the provisions of the act of February 19, 1897, 29 Stat., ch. 265, sec. 3, page 578, which requires moneys which have remained in the registry of the court unclaimed for ten years or longer, to be deposited to the credit of the United States; and a similar provision is found in sec. 4545 Revised Statutes of the United States.

It is obvious that the moneys here referred to are not the moneys of the United States. Moneys paid to the clerk in his individual capacity become a mere private trust and are no more subject to congressional control, or the control of the court, than if he were not clerk. For more than a century the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner, and during that time neither the clerks nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such. Under the provision of section 828, the clerk is

allowed "for receiving, keeping and paying out money in pursuance of any statute or the order of the court, one per centum on the amount so received, kept and paid;" and this poundage has always been allowed to them on moneys received and paid out by them. Nothing short of legislation can change the law as established by more than a hundred years of uniform and constant practice of the courts. The money sued for in this action was paid into court and received by the clerk in a "cause pending in said court," and it was the duty of the clerk to "forthwith" deposit the same as required by section 995. His failure to do so was a breach of the condition of his bon , fo- which the sureties are liable to the person suffering damage thereby.

42 A further contention of the plaintiff in error is that the money was not received by the clerk by virtue of his office. The answer set up a tender, before suit was brought, of the amount due on the bonds and concluded in these words, "and now brings the said sum into court." The answer was filed with the clerk, and the money tendered therein deposited with the clerk, at the time the answer was filed. The defendant had an undoubted right to set up this defense, and to set it up in a manner to make it effectual. A plea of tender, not accompanied with the money tendered, is bad; and a tender of the money without a plea setting it up, goes for nothing. To make its plea good, it was necessary, therefore, for the defendant to file its written answer setting up the tender and to bring the money tendered into court, as was done. The defendant did not have to apply to the court for leave to bring the money into court any more than it had to apply to the court for leave to file its answer. The answer and the money were parts of one whole, together they constituted a good plea of tender, which was the county's defense to the action. Neither was a defense without the other. The law gave the defendant the absolute right to do precisely what was done. If it was the duty of the clerk, acting in his official capacity, to file the written part of the answer, it was equally his official duty to receive and safely keep the money tendered with the answer, and which was an essential part of it. When a tender is pleaded no previous leave of the court is necessary before bringing the money tendered into court. This has been the law from the earliest times. In 6 Bacon's Abridgment, title, "Tender and bringing money into court," *p. 444, it is said: "Wherever a tender of money — pleaded, and the debt is not discharged by the tender and a refusal, money may be brought into court without leave of the court; nay, the money tendered must, as hereafter will be shown, in such case be brought into court." 2 Roll. Ab., 524; 12 Mod., 354; Ld. Raym., 83, 254, 643; 1 Barn., 181.

It is clear, then, that the money was rightly paid into court and that it was the duty of some officer of the court to receive and safely keep the same. Who was that officer? It certainly was not the judge, and it is equally clear that it was not the marshal. Under the law and practice of all the courts, State and Federal, it was the official duty of the clerk to receive and safely keep this money. The proposition is *is* too plain to require any argument or authority, but

we quote from a few cases on the subject. In McDonald *v.* Atkins, 13 Neb., 568, suit was instituted on the bond of the clerk for money paid to him by the sheriff collected on an execution issued in favor of the plaintiff, and which he had failed to account for. The court said:

"The point made by the defendant's counsel is, that the money was not received by Vedder in his official capacity—in other words, that he had no authority as clerk to receive it. And so the court below held.

"No one can doubt, we think, that this ruling was in direct conflict with the general understanding of the legal profession of this State as to the duty of court clerks in the receipt and disbursement of money paid upon judgments, from the first organization of our judicial system, through all its changes, down to the present time. Indeed, we doubt exceedingly that any one, especially a practicing lawyer, has ever supposed that upon the rendition of a money
43 judgment, the defendant could not prevent a further accumulation of costs and interest, and have a satisfaction legally entered of record, by at once paying to the clerk of the court the amount which it calls for. If he could not—if clerks are really without authority to receive money on judgments in their custody, then to whom, in the absence of the plaintiff and his attorney, could payment be legally made?

"While it is true that we have no statute which in express terms declares that the clerks of the several courts shall accept payment of judgments in their custody, it is very evident that the legislature contemplated and intended that they should do so.

"And even in the absence of such provision, can it be doubted that a party against whom a money judgment is sought by action may, upon being summoned, pay the amount demanded 'into court,' and thereby prevent the making of any further costs? But how is it to be effected? In the case of inferior courts—those not of record, and unprovided with clerks—the payment can, of course, only be made to the judge or magistrate in person; but in courts of record, where all the steps taken in the progress of the case, from the commencement to the satisfaction of final judgment, are recorded and preserved, and where a clerk for the performance of this duty is specially provided, it is otherwise. In these courts payments of money are never made to the judge, but the uniform practice in this State has always been to make them to his clerk, to whose custody and care the files, records, and whatsoever else relates to cases in courts, are confided. And this practice, so universal, although not positively directed by any act of the legislature, conflicts with none, and, as we have shown, is recognized by and in perfect harmony with several."

In State *ex rel.* McNeil *v.* Morrison, 63 North Carolina, 508, the clerk of the court was appointed as special commissioner to sell a slave. The clerk after making the sale and collecting the money, failed to pay it over, and suit was instituted on his bond as clerk, and the plea was set up that he received the money as commissioner and not in his official capacity as clerk; but the court said: "The

statute authorizes the court to appoint the clerk or some other fit person to make sales, etc. When the person who is clerk is appointed it is to be taken that he is appointed in his official capacity. Especially is this so when in the order appointing him he is designated as clerk. The clerk then and his sureties are liable upon his official bond." To the same effect is State on the Relation, etc., *v.* Blair, 76 N. Car., 78. In B. & O. Railroad Co. *v.* Gaulter, 165 Ill., 233, it was contended that: "The interlocutory decree did not designate the clerk as depositary, nor order him to receive the money, and the argument is that he was, therefore, a mere depositary of the parties." But the court said: "That decree provided for the payment of the money into court and it was paid by complainant and received by the clerk as a fund of the court under that decree," and the clerk was held liable for the money in his official character as clerk. *In re* Finks (41 Fed., 383), the court in answer to a contention similar to that made in this case, said: "The payment of money into the registry of the court through the clerk as the servant and agent of the court, where there is a fund under the control of the court, and where there is no hand designated to receive it, has been in existence from the foundation of the courts, and is too firmly fixed to be successfully assailed as not being authorized by any act of Congress, or rule of court prescribed in pursuance of an act of Congress." In Connole *v.* The People, 46 Ill. App., 72, the court said: "By the act relating to tender, it is expressly provided that costs tendered may be brought into court, and, of course, in such cases the clerk would receive the same." See Walters-Cates *v.* Wilkinson, 92 Ia., 129; Billings *v.* Teals, 40 Ia., 607. In State *v.* Watson, 38 Ark., 96, 101, the court said: "It often happens in the progress of suits that money is brought into court and placed in the custody of the clerk until disposed of by order of the court, and it would be unsafe to hold that the clerk and sureties are not responsible on his official bond for such moneys."

The contention that the relator has no right to maintain this action in the name of the United States upon his relation is without merit. Under the reformed procedure, which prescribes that the real party in interest must be plaintiff, it has been held that a suit on a bond given for the security of the public generally, and in which the State or other public corporation is the obligee, may be brought in the name of the person beneficially interested in the particular suit. Morgan *v.* Long, 29 Ia., 434; Strunk *v.* Ochiltree, 11 Ia., 158; State *v.* Fredericks, 8 Ia., 553; Binninger *v.* Dickinson, 20 Ia., 260; Latham *v.* Brown, 16 Ia., 118. Whether this is the rule under the Missouri code we need not stop to inquire. In Murfree on Official Bonds, section 323, it is said:

"It is usually provided in statutes authorizing official bonds to be required of State, county or municipal officers, that suits may be brought upon them in the name of the official obligee, 'upon the relation' or 'to the use' of the party injured by the breach of the bond or interested in its enforcement. Whenever, however, this express provision is omitted by the statute itself, the deficiency is

supplied by the construction given to such statute by the courts whenever a proper case for such a ruling is presented."

On this question we fully concur with the views of Judge Adams, who tried the case at the circuit, he said:

"It is held in the case of Washington *ex rel.* McCue *v.* Young, 10 Wheat., 406, that no person can be authorized to use the name of another without his assent, given in fact or by legal intendment. It is my opinion that, in imposing upon clerks of the circuit court the duties above alluded to, which so necessarily and vitally affect the interest of suitors in its courts, and in requiring from such clerk a bond for the faithful discharge of such duties,—the United States, by necessary legal intendment, thereby consents to the use of its name by suitors wronged by official misconduct of the clerk, in a suit against the clerk or his sureties on his official bond. This implied authority or necessary legal intendment becomes the more apparent when it is considered that the clerk's office is an agency of the United States Government, ordained and established for the use and convenience of its people. The money entrusted to its clerk, is, in a large sense, money which the Government has undertaken to keep for its people. When, therefore, the clerk, by official misconduct, embezzles or misappropriates such money, even
45 though perhaps the Government may not be subjected to a suit for its recovery, it clearly owes a highly moral and meritorious obligation to the loser, in the nature of a responsibility for the act of misconduct of its agent, and one which the National Congress might regard as sufficient to move it to a private act for his relief." 93 Fed. Rep., 719.

Moreover, if there was a technical error in stating the name of the plaintiff, this court would not reverse the case for that reason, but would direct the substitution of the name of the proper plaintiff. McDonald *v.* Nebraska (at present term) and cases cited.

The judgment of the circuit court is affirmed.

Filed April 9, 1900.

46 And on the ninth day of April, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *April* 9, 1900.

FREDERICK HOWARD, JAMES L. LOMBARD, and JOHN C. Gage, Plaintiffs in Error,
vs.
THE UNITED STATES to the Use of DAVID D. STEWART, and Witten McDonald. } No. 1288.

In error to the circuit court of the United States for the western district of Missouri.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Missouri and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that David D. Stewart and Witten McDonald have and recover against Frederick Howard, James L. Lombard, and John C. Gage the sum of twenty dollars for their costs herein and have execution therefor.

April 9, 1900.

And on the ninth day of July, A. D. 1900, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

In the United States Circuit Court of Appeals, Eighth Circuit.

47 FREDERICK HOWARD, JAMES L. LOMBARD, and JOHN C. Gage, Plaintiffs in Error,
vs.
THE UNITED STATES to the Use of DAVID D. STEWART, and Witten McDonald, Defendants in Error.

Assignment of Errors.

Now come Frederick Howard, James L. Lombard, and John C. Gage and make the following assignments of error:

The circuit court of appeals for the eighth judicial circuit erred in each of the following respects:

1. In affirming the judgment of the circuit court herein.
2. In holding that upon the finding of facts judgment should be rendered against them.
3. In holding that the suit could be maintained in the name of the United States to the use of Stewart.
4. In holding that the sureties on the bond of the clerk of the circuit court were liable for the moneys of a private party deposited under the circumstances set out in the finding of facts.

FRANK HAGERMAN,
Attorney for Plaintiffs in Error.

Endorsed: No. 1288. In the United States circuit court of appeals, eighth circuit. Frederick Howard, James L. Lombard, and John C. Gage, plaintiffs in error, *vs.* The United States to the use of David D. Stewart, and Witten McDonald, defendants in error. Assignment of errors. Filed Jul- 9, 1900. John D. Jordan, clerk. Frank Hagerman, attorney-at-law, Kansas City, Missouri.

And on the ninth day of July, A. D. 1900, a petition for writ of error, with declination of Witten McDonald to join therein, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following:

48 In the Supreme Court of the United States.

FREDERICK HOWARD, JAMES L. LOMBARD, and JOHN C. GAGE, Petitioners,
vs.
THE UNITED STATES to the Use of DAVID D. STEWART, Respondent.

Petition for Writ of Error.

Now come Frederick Howard, James L. Lombard, and John C. Gage and respectfully show that heretofore, on the 26th day of April, 1899, a judgment was rendered against them for $3,057.77 in a suit at law pending in the circuit court of the United States for the western division of the western district of Missouri, wherein The United States to the use of David D. Stewart was plaintiff and petitioners and Witten McDonald were defendants. Said judgment was rendered in an action against them as sureties upon an official bond of Warren Watson, as clerk of the circuit court of the United States, for an alleged failure of duty as such clerk. Said suit arose under the laws of the United States Thereupon petitioners (McDonald declining to join therein) sued out a writ of error to the United States circuit court of appeals for the eighth judicial circuit, wherein such proceedings were had that a judgment of affirmance was rendered on the 9th day of April, A. D. 1900. Such judgment was unwarranted in the law.

Petitioners therefore ask that a writ of error be allowed so as to have a review in the Supreme Court of the United States, presenting herewith a bond in proper form and assignment of errors.

FRANK HAGERMAN,
Attorney for Petitioners.

Allowed June 29, 1900.
DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

Witten McDonald declines to join in the foregoing petition for writ of error.

DAN'L B. HOLMES,
Attorney for Witten McDonald.

49 Endorsed: No. 1288. In the Supreme Court of the United States. Frederick Howard, James L. Lombard, and John C. Gage, petitioners, *vs.* The United States to the use of David D. Stewart, respondent. Petition for writ of error. Filed Jul- 9, 1900. John D. Jordan, clerk. Frank Hagerman, attorney-at-law, Kansas, City, Missouri.

And on the ninth day of July, A. D. 1900, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents that we, Frederick Howard, James L. Lombard, and John C. Gage, as principals, and Sanford B. Ladd and Edward F. Swinney, as sureties, are held and firmly bound unto the United States to the use of David D. Stewart in the full and just sum of sixty-five hundred dollars ($6,500.00), to be paid to the said United States to the use of David D. Stewart, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of June, in the year of our Lord one thousand nine hundred.

Whereas lately, at the December term, 1899, of the United States circuit court of appeals for the eighth judicial circuit, in a suit depending in said court, wherein Frederick Howard, James L. Lombard, and John C. Gage were plaintiffs in error and The United States to the use of David D. Stewart and Witten McDonald were defendants in error, a judgment was rendered affirming a judgment of the circuit court of the United States for the western division of the western district of Missouri rendered against said Frederick Howard, James L. Lombard, and John C. Gage on the 26th day of April, 1899, for the sum of $3,057.77, and the said Frederick

50 Howard, James L. Lombard, and John C. Gage have obtained a writ of error of the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said United States to the use of David D. Stewart, citing and admonishing it and him to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said Frederick Howard, James L. Lombard, and John C. Gage shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

FREDERICK HOWARD.
JAMES L. LOMBARD. [SEAL.]
JOHN C. GAGE,
By FRANK HAGERMAN, [SEAL.]
His Attorney.
SANFORD B. LADD. [SEAL.]
EDWARD F. SWINNEY. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

June 29, 1900.

DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

Endorsed: No. 1288. In the Supreme Court of the United States. Frederick Howard, James L. Lombard, and John C. Gage, petitioners, *vs.* The United States to the use of David Stewart, respondent. Bond for writ of error. Filed Jul- 9, 1900. John D. Jordan, clerk. Frank Hagerman, attorney-at-law, Kansas City, Missouri.

And on the ninth day of July, A. D. 1900, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with the clerk's return thereto, is hereto attached and herewith returned.

51 UNITED STATES OF AMERICA, *sct:*

The President of the United States of America to the honorable judges of the United States circuit court of appeals for the eighth judicial circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, at the December term, 1899, thereof, between Frederick Howard, James L. Lombard, and John C. Gage, as plaintiffs in error, and The United States to the use of David D. Stewart, and Witten McDonald, as defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the Supreme Court of the United States on or before the 29th day of August, 1900, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the said court. Issued at office, in the city of Washington, D. C., this 6th day of July, in the year of our Lord one thousand nine hundred.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed this June 29, 1900.

DAVID J. BREWER, *Justice.*

[Endorsed:] No. 1288. Frederick Howard *et al.*, pl'ffs in error, *vs.* The United States to the use of David D. Stewart *et al.* Writ of error. Filed Jul- 9, 1900. John D. Jordan, clerk.

Return to Writ.

United States Circuit Court of Appeals, Eighth Circuit.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this eighteenth day of July, A. D. 1900.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

52 And on the ninth day of July, A. D. 1900, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with acceptance of service thereon, is hereto attached and herewith returned.

53 UNITED STATES OF AMERICA, *sct:*

To the United States to the use of David D. Stewart, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the United States, wherein Frederick Howard, James L. Lombard, and John C. Gage are petitioners and you are respondent, to show cause, if any there be, why the judgment rendered against the said petitioners, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 29th day of June, in the year of our Lord one thousand nine hundred.

DAVID J. BREWER, *Justice.*

Service hereof accepted July 2nd, 1900, without prejudice to claim that this is not such a case as can be reviewed by the Supreme Court upon writ of error.

L. C. KRAUTHOFF,
KARNES, NEW & KRAUTHOFF,
Attorneys for the United States to the Use of David D. Stewart, Defendant in Error.

Issue and service of citation hereby waived.

DAN'L B. HOLMES,
Attorney for Witten McDonald.

[Endorsed:] No. 1288. Frederick Howard *et al.*, pl'ffs in error, *vs.* The United States to the use of David D. Stewart *et al.* Citation. Filed Jul- 9, 1900. John D. Jordan, clerk.

54 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing 53 pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Frederick Howard *et al.*, plaintiffs in error, *vs.* The United States to the use of David D. Stewart, and Witten McDonald, defendants in error, No. 1288, December term, 1899, as fully as the same remain on file and of record in my office.

I do further certify that the original writ of error, with my return thereto, and the original citation, with acceptance of service thereon, are hereto attached and herewith returned, and that a copy of said writ of error is lodged in my office for the use of the defendants in error.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this eighteenth day of July, A. D. 1900.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No., 17,851. U. S. circuit court of appeals, 8th circuit. Term No., 121. Frederick Howard, James L. Lombard, and John C. Gage, plaintiffs in error, *vs.* The United States to the use of David D. Stewart. Filed July 31st, 1900.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

FREDERICK HOWARD, JAMES L. LOMBARD and JOHN C. GAGE,
Plaintiffs in Error,
vs.
THE UNITED STATES to the use of DAVID D. STEWART,
Defendant in Error.

No. 121.

In Error to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PLAINTIFFS IN ERROR.

SANFORD B. LADD,
FRANK HAGERMAN,
Attorneys for Plaintiffs in Error.

JOHN C. BOYARD, PRINTER, N. Y. LIFE BLDG.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

FREDERICK HOWARD, JAMES L. LOMBARD and JOHN C. GAGE, *Plaintiffs in Error*, *vs.* THE UNITED STATES to the use of DAVID D. STEWART, *Defendant in Error.*	No. 121.

In Error to the Circuit Court of Appeals for the Eighth Circuit.

STATEMENT.

This proceeding in error seeks to reverse the action of the Circuit Court of Appeals for the Eighth Circuit affirming the judgment of the Circuit Court of the United States for the Western Division of the Western District of Missouri. In the latter court a petition (Rec. 3, 4) was filed in the name of "The United States to the use of David D. Stewart" as plaintiff against Frederick Howard, James L. Lombard, John C. Gage and Witten McDonald, as sureties upon the bond of Warren Watson as former clerk of that court. Because of his discharge in bankruptcy the case was dismissed as to Witten McDonald (Answer and Stipulation, Rec.

15; Judgment, 16; Finding, 20) and judgment (Rec. 16) rendered against the other sureties, Howard, Lombard and Gage, the case having been submitted upon an agreed statement of facts (Rec. 11-14), a written stipulation (Rec. 11) having been filed waiving a jury. Judge Adams as the trial judge delivered a written opinion (Rec. 23-28), which is reported in 93 Fed. Rep. 719. A writ of error was sued out by plaintiffs in error (Rec. 1, 2, 20, 21) to the Circuit Court of Appeals, where the judgment was affirmed (Rec. 41), the opinion (Rec. 31-40) delivered by Judge Caldwell being reported in 102 Fed. Rep., 77; 42 C. C. A., 109). A writ of error to the Circuit Court of Appeals was allowed by Mr. Justice Brewer and the case thus brought to this court (Rec. 41-45).

The special findings of fact (Rec. 16-20) upon which the judgment was rendered read:

"This cause came on for hearing on the written stipulation of the parties waiving a jury, and upon an agreed statement of facts, and a separate stipulation as to defendant Witten McDonald. No other testimony was offered in the case.

Thereupon the court, sitting as a jury, does, in accordance with said agreed statement of facts, and at the request of the counsel for the defendants, specially find the facts herein as follows:

1. Upon March 3, 1887, Warren Watson was appointed clerk of the United States Circuit Court for the Western Division of the Western District of Missouri, and acted as such from that date until his death, which occurred on the 24th day of March, 1892.

Upon March 3, 1887, said Warren Watson, with these defendants, executed his bond as such clerk in words and figures as follows: 'Know all men by these presents: That we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the City of Kansas, in the County of Jackson, State of Missouri, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars lawful money of the United States, to be paid to the said United States, for

which payment, well and truly be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this 3rd day of March, 1887.

The condition of the above obligation is such, Whereas the said Warren Watson has, pursuant to law, been appointed to be clerk of the circuit court of the United States for the Western Division of the Western District of Missouri, as by order of appointment bearing date the 3rd of March, 1887, and recorded on page 70 of Book Law D of the records of said Court will more fully appear.

Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of said court, then this obligation to be void; otherwise to remain in full force and virtue.

WARREN WATSON, [Seal]
FREDERICK HOWARD, [Seal]
JOHN CUTTER GAGE, [Seal]
JAMES LEWIS LOMBARD, [Seal]
WITTEN MCDONALD, [Seal]

Approved: A. KREKEL, Judge.'

This is the same bond mentioned in the petition and copied in the answer, and was the only bond ever executed by defendants or on behalf of Watson as such clerk. It was at the time of its execution approved by A. Krekel, a then judge of said court, who endorsed his approval thereon, and each of the parties to said bond qualified in writing as to the amount of property owned by each, which qualification was filed with said bond.

2. Warren Watson was a resident of Jackson county, Missouri, and while still acting as such clerk died on the 24th day of March, 1892, and on the 2nd day of April, 1892, Fred. W. Perkins was by the probate court of said county duly appointed as his administrator and as such, on the 5th day of April, 1892, gave the notices required by the statutes of Missouri for the presentation of claims against said Watson's estate. On the 11th day of September, 1894, said estate having been completely administered upon, was closed and the administrator discharged. At no time did the United States, or David D. Stewart, the relator, ever exhibit or pre-

sent any demand or claim against said estate in said probate proceedings, or as provided by the laws of Missouri for exhibiting or presenting claims against the estates of decedents.

The amount of demands allowed against the estate of said Warren Watson and assigned to the fifth class is $2630.91, and on this sum there was paid a dividend of .0331 per cent or in the aggregate $90.41 and no more.

3. On February 6, 1891, the relator, David D. Stewart, as plaintiff, instituted in said United States Circuit Court his suit at law against Henry county, Missouri, in which his causes of action were set forth in a petition containing three counts, the first asking a judgment for $1010.00 with interest from the 1st day of September, 1887, on a bond of defendant for $1000.00 dated July 1, 1882, payable at the National Bank of Commerce of New York on July 1, 1892, with six per cent interest, evidenced by coupons, but at the option of the county the bond was payable at any time after July 1st, 1887. The second count was upon a similar bond for $1,000, and the third count was on a like bond for $500.00.

On March 3rd, 1891, defendant, Henry county, filed in said cause its answer; said answer as to each of the first and second counts being that on September 6th, 1887, there was due on said bond $1,010.00, and on that date it deposited that sum in the National Bank of Commerce of New York, for the payment of the bond and interest, and on September 6th, 1887, tendered that sum to the plaintiff as full payment of the bond and interest thereon, but plaintiff refused to accept same 'and defendant says it has at all times been ready and willing to pay plaintiff said sum of $1010.00 in full payment of said bond and unpaid interest, and now here again tenders to plaintiff said sum of $1010.00 in full payment of said bond and unpaid interest due thereon, on September 6th, 1887, and now brings the said sum into court.' The answer to the third count was exactly the same except that the amount named was $505.00 instead of $1010.00.

Upon March 3rd, 1891, there was entered on the records of said court in said cause the following:

'This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the

clerk the sum of $2525.00 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein.'

On June 27th, 1891, the plaintiff in said suit filed his reply, which was a general denial.

On July 2, 1894, there was entered on the records of said court in said cause the following:

'This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court and by the court taken under advisement with leave to the parties to file briefs.'

On February 11, 1895, there was entered on the records of said court in said cause the following:

'A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to-wit: On the first count of the petition the court finds that the principal and interest on Bond No. 204 was duly tendered by defendant at the place of payment on the first day of September, 1887, and that after the plaintiff instituted this action in this court and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of $1,010 00.'

(The findings as to the second and third counts are precisely similar except as to the amounts, the second count being $1010.00 and the third $505.00).

'It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars ($2,525.00), the aggregate amount found to be owing to him under the three

counts of the petition, and that plaintiff pay the costs of this action and that execution issue therefor.

And it further appearing to the court that the said sum of $2,525.00, so paid into court as aforesaid, was paid to and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk, or otherwise. It is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid.' No appeal was taken from this judgment, and the same has become final and remains in full force and effect and unpaid.

4. On March 3rd, 1891, Henry county did hand to Warren Watson the sum of $2,525.00 as in said entry of that date recited.

No order or direction of the court as to this money was ever made, had or obtained, and no entry in reference to the same was ever made, except as set out in paragraph 3.

When the $2,525.00 was so paid to said Warren Watson, he on the same day deposited the same in a bank to his own credit, and at no time did he treat the money as in the depository of the court. He never at any time presented any account to the court of such money, and has never paid it to Henry county or David D. Stewart, and never during the pendency of the suit of *Stewart v. Henry County* did either party take any steps towards having any order made in relation to the said money other than was actually made, nor make any objection to the method in which said money was received.

David D. Stewart had no knowledge of said acts of Warren Watson.

5. At no time was demand made on these defendants or Warren Watson for said money other than is to be inferred from the institution of the suit.

The court further finds that the defendant, Witten McDonald, has been discharged of any obligation on his part to the plaintiff by reason of a discharge duly granted him by the United States District Court for the Southern Division of the Eastern District of Missouri in bankruptcy; that said discharge was duly granted and said proceedings duly had.

Upon the finding of facts above made the court concludes as a matter of law that the relator is entitled to judgment against the defendants, Howard, Gage and Lombard, for the sum of $2,525.00, with interest at six per cent from the date of the filing of the petition herein, October 19th, 1895, a total of $3,057.77, and that defendant, Witten McDonald, is entitled to judgment in his favor.

Dated Kansas City, Missouri, April 26, 1899.

(Signed) ELMER B. ADAMS, Judge."

The errors here assigned (Rec. 41) and relied upon are:

"The circuit court of appeals for the eighth judicial circuit erred in each of the following respects:

1. In affirming the judgment of the circuit court herein.

2. In holding that upon the finding of facts judgment should be rendered against them.

3. In holding that the suit could be maintained in the name of the United States to the use of Stewart.

4. In holding that the sureties on the bond of the clerk of the circuit court were liable for the moneys of a private party deposited under the circumstances set out in the finding of facts."

ARGUMENT FOR PLAINTIFFS IN ERROR.

I.

The Statutes of the United States Required Bonds to be Given by the Clerks of the Circuit Courts Solely for the Protection of the United States and not at all for the Protection of Private Parties.

(*a*) *The bond here is the statutory bond.*

About this there has been, and will be, no dispute. The statutes of the United States (18 U. S. Stats., 1333; Sup. Rev. Stats. (2nd Ed.), 65; Rev. Stats. Sec. 795) provide that the clerks of the supreme court and the circuit and district courts, respectively, shall each give bonds of a prescribed form, and the bond in this case was of that form. The bond, therefore, was a statutory bond, and created the statutory liability and none other.

(*b*) *The general rule supported by authority.*

The general rule on this subject is stated in Murfree on Official Bonds, Section 504, thus:

"The primary object of an official bond is, of course, to protect the interests of the beneficiary named in it, the state, county, corporation, etc., as the case may be. By statute, however, it is usually provided that bonds given by officers to states and counties shall be available to protect the interests of private persons who may be aggrieved by the breach of such bonds. They cannot be used, however, for these purposes in cases unprovided for by such statutory enactment."

The rule thus announced is abundantly supported by the authorities.

In *State v. Nichol*, 8 Heisk., 657, it was said:

"The bond is given to the state, is intended to enforce the performance of official duties and to indemnify the public against official delinquencies. Such is the plain meaning of its terms and from the nature of the case, unless otherwise directed by statute, would be its object. It certainly was not intended to be operative in favor of individuals for any wrong done to them by the officer."

In a very early Massachusetts case (*Crocker vs. Fales* 13 Mass., 262), brought upon the bond of the clerk of the court of common pleas, in an opinion by Chief Justice Parker it was said:

"The condition of the bond is very general, providing only for the faithful execution by the clerk of his trust, and for the keeping up of the records; and this is in pursuance of the statute of 1786, C. 57, Sec. 3, which provides for the safe keeping of the records. By the statute of 1795, C. 41, commonly called the fee bill, it is made the duty of the clerk to receive the fees of the crier for his use. The bond in suit was given to the county treasurer to secure the faithful discharge of duty by the principal obligor, as clerk of the court of common pleas, and to keep up seasonably the records. It is contended by the plaintiff that this breach is well assigned, because it being made the duty of the clerk to receive the fees of the crier, it was his duty to pay them over, and a failure of that duty upon demand is a breach of the bond. And this would be a just conclusion if we were satisfied that the legislature, in requiring a bond in this form, intended to secure to individuals an indemnity for such omissions by the clerk as would be injurious to them. But, upon duly considering the condition of the bond, and the statute upon which it is founded, we are satisfied that such was not the intent of the legislature. There is nothing in the act which shows a design to protect individual sufferers against the negligence of the clerk to pay over moneys which may come into his hands. The bond is given to the treasurer of the county as the representative, in this respect, of the inhabitants. The penalty is discretionary with the court between fifty and three hundred pounds, the largest of these sums being wholly inadequate if it was intended to cover all the pos-

sible delinquencies of a clerk. There is no mode prescribed by which the individal is to maintain an action upon the bond. Nor is there any authority given to the treasurer to deliver over the bond, or even a copy of it, or to pay over the proceeds of a judgment to him who shall cause the suit. Nor is the person, for whose use the action may be brought in the name of the treasurer, made liable to the costs in case the suit should fail. *The damages recovered by any one officer might consume the whole penalty*, and the public be left without any of the security which was intended for the preservation of the records. * * * The principles applicable to the bond which is given by a sheriff to the commonwealth are wholly different. * * * Provision is also made for the delivery of a copy of the bond, and for the bringing into court of the original, when an action is commenced upon it at the suit of an individual. Further, there is a provision that he who procures the suit shall pay the costs, if he fail. From all these considerations, we are clear that no breach of the bond sued in this action is alleged; and that the crier, who has sought this relief, must look to the clerk himself for retribution."

An early Virginia case was brought against the clerk of a county court and the sureties on his bond, "which was conditioned that he should duly and faithfully execute his said office, and should not remove or carry, or suffer to be removed or carried, out of the county aforesaid, the records or papers of the said court, or any part thereof, except in cases allowed by law." The law made it the duty of the county courts to collect and account for to the treasurer certain public taxes on houses of entertainment, merchant's licenses, etc. The breach alleged was that the clerk had collected such taxes to the amount of $1,043, and had failed to account therefor. The court held that this form of *official* bond of a clerk covered only his proper duties as clerk to make and keep the records, and not such duties as might be imposed on him by law outside of those clerical duties. President Tucker, in the opinion of the court in that case, said and showed that it had been the practice in Virginia for more than one hundred and twenty-five years to require bonds

with proper special provisions to cover such liabilities, and instanced the case of sheriffs who had at times been required to give three or four different bonds, one for collecting public taxes, another for fines and levies due the commonwealth, and another for collecting and paying officer's fees, executing and returning process, paying all money received, and for due performance, etc., and still other bonds. (*Auditor v. Dryden*, 3 Leigh, 703).

The form of bond required by Section 795 was originally prescribed by the Judiciary Act of September 24th, 1789. (1 *Stat. at Large*, 76). At that time the language thereof had a fixed and well settled meaning recognized by Chief Justice Parker (*Crocker v. Fales*, 13 Mass., 262) and President Tucker (*Auditor v. Dryden*, 3 Leigh, 703), *i. e.*, the condition was not intended as security for private individuals. It is, therefore, to be fairly assumed that Congress did not intend to give any greater effect to the language, but intended to use it in the sense then understood by those learned in the law. It is a rule of construction that where words have a well understood legal meaning, it is to be presumed that the legislature used them in that sense when subsequently adopting a statute. This view is sustained by similar views taken as to bonds, likewise conditioned, where the statute did not expressly give a right of action to individuals injured.

In Texas (*McRea v. Williams*, 58 Texas, 328) in a suit against a mail contractor and the sureties on his contract with the United States by the owner of the letter lost by robbery, committed by one of the contractor's servants, it was held that the bond secured only the United States, and that the sureties were not liable to individuals for their injuries.

In Georgia (*Clark v. U. S.*, 60 Ga., 156) a like ruling has been made. There the suit was in the name of the United States, to the use of the individual complaining,

against the collector of internal revenue and the sureties on his official bond, for the alleged illegal seizure of horses, wagons, etc. The court said:

"The collector's bond sued on by the plaintiff in this case is a contract for the indemnity of the United States alone, and not for the indemnity of private persons who may be injured by the wrongs or torts of the collector or his deputies. The plaintiff's suit is on a contract, and the injury complained of as a breach of that contract is in the nature of a tort committed on the plaintiff's property by one of the collector's deputies, for which the collector and his sureties are not liable on his bond required by the 3143rd section of the Revised Statute of the United States, although he might be proceeded against under the 3149th section."

In *Idaho Gold Reduction Co. v. Croghan*, (Idaho) 56 Pac. Rep., 164, it was held that a private individual cannot sue on a postmaster's bond, the court, among other things, saying:

"We know of no law authorizing the bringing of suit upon a postmaster's bond by a private party. It could only be done by virtue of some statutes of the United States, and we know of no such statute. The statutes of the United States (Rev. St. U. S., Sec. 784) provide for the bringing of action upon the bond of a marshal, by any person injured by a breach of the condition of such bond; but no such provision is made as to the bond of a postmaster. * * * That an action can be brought upon the official bond of a postmaster by a private party alleged to be injured by the wrongful conversion, by the postmaster, of moneys belonging to such private person, and that without setting forth or producing the bond, or a copy of it, in the record, is a proposition of which we can find no authority. That the postmaster is liable to a private person for money or property lost through the negligence or wrongful act of the postmaster or his assistants or servants is, we think, established by the authorities; but we have found no case where such recovery was had or sought by action upon the postmaster's bond to the United States."

In *White v. Wilkins*, 24 Me., 299, Shepley, J., said:

"No private suit can be maintained on an official bond made to the state or its treasurer without its consent. *Commonwealth v. Hatch*, 5 Mass., 191. And when the statute giving the consent prescribes the remedy, that remedy must be pursued."

Commonwealth v. Hatch, 5 Mass., 191, was instituted for the use and benefit of Asa Nichols on the bond of Bruce, who was the inspector of beef for the Commonwealth, and the bond declared on was conditioned for the faithful performance of the duties of his said office, and the bond was put in suit in the name of the Commonwealth by Nichols for his own use, without any authority from the legislature or the executive department, to recover a compensation out of the penalty for damages which he (Nichols) alleged that he had sustained by the unfaithfulness of Bruce in his said office. The court said:

"And it appearing by the statute directing the bond, and by the bond, that it was given for the sole use of the commonwealth, and no law having authorized any person to avail himself of a breach of the condition; and it further appearing that the action was not commenced, and is not prosecuted by either of the public law officers, nor by any person having authority to prosecute the same, it was ordered by the court that all further proceedings in this action should stay."

In Missouri (*City of Kansas ex rel Blumb v. O'Connell*, 99 Mo., 357) suit was brought against a contractor and the sureties on his bond, by a party injured in the performance of the contract. The bond sued on was given in compliance with the provisions of the charter of Kansas City, which required from every contractor doing public work a bond for the payment of all laborers engaged in the work. The court said:

"The same section goes on to give the laborers an action upon the contract, and prescribes the procedure. But the charter makes no such provisions in favor of other per-

sons. Nor is it claimed that there is any statute which gives to plaintiff the right to sue on this bond. * * * This bond must be construed as a whole, and when this is done, aside from the covenant to pay laborers, it is simply one of indemnity to the city. It does not profess to create any obligation in favor of third persons, save in the single case of laborers."

An early case here (*McCue v. Young*, 10 Wheat., 406), was a suit on the bond given by the manager of a lottery to the City of Washington, in pursuance of an ordinance, and conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance," and the court, in an opinion by Mr. Chief Justice Marshall, said:

"No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent given in fact, or by legal intendment. * * * The proprietors of the ticket No. 1037 have shown no right to sue on this bond. * * * But if they have, without authority, put this bond in suit, the proper course is to turn them out of court, not to render a judgment, which may bar any future suit brought by the plaintiffs, whose names have been improperly used."

From all these authorities it appears clearly that the rule of Mr. Murfree's text is correct, and that in the absence of any provision in the statute expressly giving a right of action thereon to individuals, the bond must be held to be exclusively for the protection of the government or the subdivision thereof authorized to require it.

(*c*) *The general rule is supported by reason.*

The bond is required to run to the government, and is required to be given in order to secure the performance by the officer of his official duties. Now, where those duties concern the public only, our question can, of course, not arise, but where those duties not only concern the public but also affect individual interests in the absence of anything

whatever in the statute relating to individual rights, how can it be claimed that the bond required to be given *to the government* for the performance of the duties *to it* shall be held to include protection to individuals affected by the discharge of those duties as well as the government itself? We are not now speaking of the *policy* of protecting those interests. Let it be conceded that such policy should prevail. The question here is not one of policy, but is merely one of *construction*.

Mr. Murfree, in the passage hereinbefore quoted, says that "it is usually provided that bonds given by officers to states and counties shall be available to protect the interests of private persons who may be aggrieved by the breach of such bonds." But though this is the usual course (*Maryland v. Baldwin*, 112 U. S., 490), it is not uniform nor universal. Though *now* generally pursued, it was not always so. The question is: Is there any necessity for such course; is there any sense in it; does it serve any purpose; does it affect or change in anywise the meaning of the statute? Would the statute without such provisions mean exactly the same thing that it does with it? If the statute without the provisions relating to individual protection and individual rights means exactly and precisely the same as with such provisions, why and how did the modern course originate of inserting such provisions in the statutes—that course to which Mr Murfree refers?

The rule of construction for which we contend is not a mere technicality, though as a merely technical rule for the construction of written laws it would be strong enough, because there are in that regard certain defined and settled rules of law absolutely essential in determining the meaning of statutes, and since all legislative bodies are necessarily presumed to know the law, there is no impropriety in assuming that every statute is enacted in the light of said rules. And although this is universally true in regard to all such rules, it is, and ought to be, pre-eminently true of such a rule as

we are contending for here, one which merely holds that, in the absence of language to the contrary, the implication will arise from a statute requiring a bond to the state from a public officer for the discharge of his official duties, that it is intended wholly for the protection of the state, and not at all for the protection of any individual whatever. What if this rule of construction as an original proposition be wrong? It is now an established rule of construction, and every statute enacted in the light of it ought to be read, in such light. Because if the legislative body wants the law to be otherwise than it would be when thus read, all it would have to do would be to say so in one or two words, and when it says nothing it must be presumed to intend the consequences of its silence.

But we were saying that this rule of construction is not a mere technicality, based upon the principle that a bond must be presumed to be for the purpose of protecting the party to whom it runs. There are many other reasons for this rule and they find expression or explanation from the provisions of the various statutes which have from time to time been enacted in different jurisdictions for the purpose of protecting individual interests where the duties of the public officer alike affect public and private interests. As an example of those reasons, where both such interests are involved and the bond is required for the purpose of protecting both interests, how are such interests to be protected as regards *each other?* If there should be both a public and private loss, if the penalty of the bond should be insufficient to cover both, which is to have priority? Or if they are to be prorated, on what basis is it to be done? Again, as the number of individuals affected may be exceedingly great, and the first loser may not exhaust the penalty of the bond, if the individual is authorized to sue, what is to become of the residue of the penalty as to future losses, private or public? And, therefore, on account of these and other complications of a kindred nature, who is to bring the suit in case of a private loss,

who is to control and manage it, the individual or the state? Again, where there are numerous private losses or injuries which in the aggregate exceed the amount of the penalty, are they to be prorated or is the first come to be first served, after the fashion of the diligent creditor who first seeks a common fund? Is there to be any limitation of time against the individual loser? Statutes of repose do not as a usual thing run against the state, but the wisdom of the ages teaches their usefulness, if not their necessity, as against all private claims. Therefore, if the bond is to cover private injuries, some period of limitation ought to be prescribed therefor. As to all these matters the statute should provide. For all these reasons, and possibly for others of a like character which may suggest themselves to the court, a bond running to the state, given by a public officer under a statute requiring it for the discharge merely of public duties and not more, ought not to be inferred to be for private protection of individuals. The inference is just the opposite. The inference in favor of individual protection cannot be drawn, because how can the difficulties mentioned be adjusted and settled? Who shall bring the action? In case of loss who shall pay the costs? Who has priority? If there be no priority, on what terms shall the penalty be prorated? What is to become of the bond for the future when judgment is once rendered thereon? What period of limitation is to govern and apply to the bond as to private suitors? All these and other like matters cannot be left to inference, but must of necessity be regulated and controlled by express provisions of the statute.

And in practice it will be so found. (1 Rev. Sts. Mo., Secs. 478-490) Wherever a statute provides that the bond shall be for the protection of private interests it will be invariably found that some provision is made in relation to all or at least many of the matters hereinbefore referred to by us, thus showing the importance of the provisions, their necessity, where private rights exist and the effect upon pri-

vate rights, where all such provisions are wanting. We believe, after quite a thorough search through the authorities, that, aside from the opinions below, no case can be found in which it has been held that, where there is in the statute an absolute silence upon individual rights and interests, an individual can maintain an action upon the official bond of a public officer given to the government. The view of the law taken below on this subject was neither in entire accordance with our contention nor entirely contrary thereto. The opinions below, not perhaps stated expressly or directly, but certainly by necessary implication, were that it is necessary for the statute prescribing the bond, either expressly or by legal intendment, to provide for the protection of individual interests. It was not claimed that the statute here involved expressly provided any such protection, but it was held that the statute does this by legal intendment. That conclusion was based largely, if not entirely, upon the supposed difference between the offices of the circuit and district court clerks, holding that such legal intendment must exist with reference to the clerk of the circuit court because of the fact that his duties are largely confined to and concern private suitors, having little to do with the United States, and intimating so broadly as to be tantamount to a direct ruling to that effect, that it is different in the case of the district clerk, whose duties almost entirely concern the United States, and have very little, if anything, to do with individuals, and that in the latter case there can arise no such legal intendment. Now, we propose, in connection with the discussion of this question, to take up and review the statutes of the United States relating to clerks and their bonds, not only as they existed at the time the bond in suit was given, but also as they were originally enacted in 1789 at the adoption of the Judiciary Act, and were afterwards changed and amended from time to time. And we also propose to review in the same manner the other statutes of the United States bearing upon similar officers

and their bonds, and which can with perfect fairness be said to stand *in pari materia* with the statute directly involved herein. This for the purpose of assisting this court to arrive at a true and correct construction of said statute. But we cannot refrain from saying now, somewhat in advance and perhaps prematurely, that the strangest thing in this entire case is that, although the circuit court's opinion is based upon a supposed or fancied difference between the bonds of circuit and district clerks, the statute makes no such difference whatever, and that in reality the very same section of the statute, in the same words exactly, requires a bond to be given by the clerks of the supreme, circuit and district courts, and that, therefore, the bond in each case must, of necessity, be for the protection of the same interests, and impose upon the officer and his sureties the same character of liability. There cannot be in one case a legal intendment that does not exist also in the other cases. If, therefore, the the circuit court was right in holding that there is in the case of the district clerk no legal intendment in favor of individual rights or interests, so that the individuals injured by his failure to discharge his official duties may sue on his bond, then clearly it was in error in holding that there was such legal intendment in the case of the circuit clerk. The statute says the same thing about both clerks, and it means the same thing in both instances. The statute does not apply to clerks of circuit courts only and their bonds, but also to the clerks of the supreme, district and circuit courts alike, and that originally in 1789 there was in fact no separate and distinct office of circuit clerk, the district clerk performing the duties of circuit clerk in addition to the duties of his own office. In this situation of things no construction can he given to the statute that does not apply alike to both district and circuit clerks. Now, on what ground can it be claimed that as to district clerks an implication or legal intendment arises from the statute that private or individual rights shall be protected by the bond? It

must be conceded that his official duties almost entirely concern the United States, and but rarely, if ever, relate to individual suitors. Now, as to such an office, what legal intendment arises that the bond given to the United States is not only for their protection, but also the protection of private suitors? To so hold would be to destroy the rule that, in the absence of some provision in the statute to the contrary, an official bond by a public officer to the state is solely for the protection of the state, because if the implication against said rule arises on the statute here in the case of the district clerk, it would arise in all other cases, on all other statutes. And so we maintain that here there is no room for any exception, and that here the rule prevails. The bond was for the protection only of the United States. The United States alone could sue thereon.

(*d*) *The construction that Section 795 as amended gives no right of action to individuals, nor any right to an individual, to sue upon the bond, is strongly fortified by the rule that the contract of suretyship cannot be extended by implication, and by congressional construction ascertained from other legislation upon similar subjects.*

The cardinal rule of construction is to carry out the legislative intent as gathered from the words of a statute. This does not, however, authorize the reading into a statute of words not there found, because in such case the omitted subject will be *casus omissus*, in which case they cannot be supplied, for, in *Sutherland on Stat. Const.*, Sec. 430, it is said:

"Lord Brougham said: 'If we depart from the plain and obvious meaning, we do not in truth construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it.' 'We are bound,' said Buller J., 'to take the act of parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make

law.' It will make no difference if it appears that the omission on the part of the legislature was a mere oversight, and that without doubt the act would have been drawn otherwise had the attention of the legislature been directed to the oversight at the time the act was under discussion."

Hence it will not do for a court to say that Congress should have given a right of action upon a clerk's bond, or that justice requires the clerk to respond in such instance. We are not dealing with the clerk's individual liability, but are speaking alone for sureties who, as the books say are "favored suitors of the law" and are liable only on the *precise and exact terms* of their bonds. (*Reese v. U. S.*, 9 Wall., 13, 21.) They are entitled to invoke the rule so often stated: the contract of suretyship is to be *strictly construed* and not extended *by implication* beyond its terms. (*Miller v. Stewart*, 9 Wheat., 680, 703; *U. S. v. Boecker*, 21 Wall, 652, 657; *U. S. v. Hough*, 103 U. S., 71, 73.)

In *Miller v. Stewart*, *supra*, it was said:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness."

If, however, the failure to give a right of action was not clearly omitted from the statute and the question were one of doubt, as expressed by the court below, *where liability was spelled out by imptication alone*, then it would be proper to resort to legislative construction. (*Sutherland on Statutory Construction*, Secs. 307, 311.) This legislative intention is

best ascertained by finding what, if anything, has been done by Congress in the way of giving an individual a right of action upon an official bond; whether Congress did, as the learned judges below held, when it so intended, give it by implication, or whether it gave it in plain and explicit terms? We undertake to say that whenever Congress intended to give such an individual right of action it was given in plain, express and unmistakable terms, as we will now show.

United States marshals give bond (Sec. 783) as security for the benefit of individuals (Sec. 785), and for breach thereof any person injured may sue and recover in his own name (Sec. 784); whereas for a clerk's bond there are no such provisions. The *original* marshal's bond is filed with the clerk (Sec. 783), so that individual suitors who have an interest therein may have access thereto and have at hand the actual signatures of the sureties, if execution be denied, whereas the *original* bond of the clerk is filed with the Department of Justice (1 Supp. Rev. Stat., (2nd Ed.) pp. 65, 66, Sec. 3). The only conceivable reason for the distinction is that the United States alone is interested in the clerk's bond. By Section 786, no suit can be maintained on a marshal's bond after six years; as construed, this bar alone pertains to individual actions, because the United States is not within a statute of limitation unless expressly included. (*U. S. v. Godbold*, 3 Woods, 550, s. c. 25 Fed. Cas., No. 15219, p. 1340; *U. S. v. Rand*, 4 Sawy., 272, s. c. 27 Fed. Cas., No. 16116, p. 695.) No limitation exists on a clerk's bond. This manifestly because no one but the government has a right of action thereon.

Section 1735 requires bonds from consular officers and expressly gives a right of action thereon to individuals injured. Bonds from mail carriers are required, but the courts say an individual cannot sue thereon. (*McRea v. Williams*, 58 Tex., 328.) Section 3143 requires a bond from a collector, with like conditions as in the clerk's bond,

yet it gives no right of action to individuals, and it has been expressly ruled that an individual cannot sue thereon. (*Clark v. U. S.*, 60 Ga., 156.) So the statute requires bond from a postmaster (Sec. 3834), but an individual cannot sue thereon. (*Idaho Gold etc. Co. v. Croghan*, 56 Pac. Rep., 164.)

Bonds for the faithful performance of duties are required from the assaying officer (Sec. 3561), the assistant treasurer (Sec. 3600), special agents of disbursing officers (Sec. 3614), letter carriers (Sec. 3870) and pension agents (Sec. 4779). Although these bonds, like the clerk's, are in each instance for the faithful performance of duty, yet no express right of action is given to the individual injured. Yet in every instance individual loss may be sustained by the officer not faithfully performing his duty. No case can be found authorizing an individual recovery on any such bonds.

By section 995 all money paid into court is required to be deposited in the depositary. By section 798 the clerk is required to report at each term the status of each deposit, and by section 996 no money in the depositary can be drawn except upon an order *signed by the judge*. Section 5504 makes it a crime for the clerk to fail to pay money into the depositary. These provisions suggest that the rights of the individual suitor were so carefully guarded that Congress saw no reason why a right of action on the bond should be given to individuals.

If parties to causes did their duty in seeing that these provisions were complied with, or if the court did its duty, there could be no individual loss. Congress, therefore, intended to substitute for the personal responsibility of sureties to individuals the official responsibility of the judge, upon whom all could rely. To lend force to the argument, we may suggest there could have been no possible loss if the plaintiff, for whom it is claimed the money was paid, and who now sues *because it was his money*, had, in the cause to

which he was a party, and of which the sureties were ignorant, been careful enough of his rights to see to it that these wise provisions of the law were complied with.

If, as claimed and held below, the mere entry of the clerk of the receipt of the money was a deposit *on the order of the court*, then a compliance by the court with these provisions would have saved loss. It is not, however, to be presumed that the court ignored the law; hence, as we shall hereafter see, we must assume that the money was not paid in by order of court, and hence the clerk did not receive the money by virtue of his office.

II.

There could be no liability upon the bond for the money received by Watson unless he received same by virtue of his office. The money in this instance was not received by Watson by virtue of his office.

(*a*) *The statutes of Missouri on the subject of tender have no application in the federal courts.*

No statute of a state can, of course, have any binding force or effect upon the federal courts except by virtue of some federal statute providing that it shall apply to and govern said courts. The only federal statute on this subject is the well known section 914 of the Revised Statutes, which provides that the practice, pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to those existing in like causes in the state courts. But this statute does not include state statutes concerning tender, or which relate to mere matters of cost.

The purpose and object of section 914 have been frequently explained and defined by this court. Many states had adopted codes of civil procedure. The practice and pleadings of the common law still prevailed in the fed-

eral courts. It was deemed inadvisable that this contrariety of pleadings and practice in the state and federal courts should continue to exist. Congress was denied by the constitution the power to make any changes so far as concerned actions in equity, but it was unhampered so far as concerned actions at law, and therefore, in order to prevent, so far as it lay in its power, the inconveniences arising from the differences in the forms and practice in vogue in the two judiciary systems, it enacted said section. The practice and pleadings as established by legislative enactment in the several states were adopted for the federal courts therein *as near as may be*, but not every state enactment relating to proceedings in court. The prime object was to adopt the codes of civil procedure in the various states, and even the codes were not adopted absolutely but only "as near as may be," that is, as near as could be done in view of the rules of law, and of practice outside of matters covered by such codes, peculiar to the federal courts. And so it has come to be held by the federal courts that whenever any state statute relating to judicial proceedings is in conflict with an established rule of the federal courts, the former gives way to the latter, and that always where there is a federal statute upon any matter it always controls without regard to what may be the state statute upon the same subject. And it has also been held that very many other matters of practice are not covered at all by said section.

The manner of taking cases from a lower to an appellate court of the United States is not within said section. (*Chateaugay Iron Co., Petitioner*, 128 U. S., 544; *Fishburn v. R. Co.*, 127 U. S., 60; *Hudson v. Parker*, 156 U. S., 281; *U. S. v. Indian etc. Dis.*, 85 Fed. Rep., 930). No statute of a state is recognized which in any manner hampers or restricts the judges in the personal discharge of their accustomed duties, or which trench upon the common law powers with which in that respect they are clothed. As to all such

matters state statutes are disregarded. Sec. 914 does not include them. (*Indianapolis etc. R. Co. v. Horst*, 93 U. S., 300; *Mutual etc. Fund Assn. v. Bossieux*, 1 Hughes, 386). The state practice in relation to charging juries is not adopted. (*Martindale v. Waas*, 11 Fed. Rep., 551; *Nudd v. Burrows*, 91 U. S. 426; *Indianapolis etc. R. Co. v. Horst*, 93 U. S., 291; *U. S. v. Train*, 12 Fed. Rep., 852; *Chateaugay Iron Co., Petitioner*, 128 U. S., 553; *Chapman v. Handley*, 151 U. S., 442; *Sommers v. Carbon Hill Coal Co.*, 91 Fed. Rep. 343); nor that in relation to special verdicts or findings. (*M'Elmee v. Lumber Co.*, 69 Fed. Rep., 319); nor that relating to the examination of the defendant in any case, at law or in equity. (*Beardsley v. Littell*, 14 Blatch. 102, Fed. Cas. No. 1185); nor that relating to motions for new trial. (*Indianapolis etc. R. Co. v. Horst, supra; Newcomb v. Wood*, 97 U. S., 581); nor that regulating what papers may go to the jury room. (*U. S. v. Train*, 12 Fed. Rep., 853); nor that requiring exemplary and actual damages to be separately found and stated. (*Times Pub. Co. v. Carlisle*, 94 Fed. Rep. 762).

The statute of the state to which reference hereunder has been made is section 2939 (R. S. Mo., 1889) and reads as follows:

"If, in any suit pending, the defendant shall, at any time, deposit with the clerk, for the use of the plaintiff, the amount of the debt or damages he admits to be due, together with all costs that have then accrued, and the plaintiff shall refuse to accept the same in discharge of his suit, and shall not afterward recover a larger sum for his debt or damages due, and costs accrued up to the time of deposit, than the sum so deposited, he shall pay all costs that may accrue from and after the time such money was so deposited, as aforesaid."

This statute is nothing more than a regulation of costs. It undoubtedly does authorize the depositing of the amount of the tender in any case with the clerk, and thus by impli-

cation makes it an official duty of the clerk to receive and care for the deposit, but this is a mere incident to the purpose and object of the section, which is to protect the defendant from costs where the tender is wrongfully refused by the plaintiff.

There is no provision of the state law for depositing money into court. Deposits are made with the clerks, who, by express provisions of law, are liable on their bonds to individuals, the statute as to their bonds (1 Rev. Stats. Mo. 1899, Section 516) providing:

"The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hand by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

It goes without saying that the State of Missouri cannot prescribe the duties, or regulate the offices, of the clerks of the courts of the United States; and that, therefore, so far as said section may be regarded as a mere regulation of the office of clerk, it has nothing whatever to do with the office of clerk of the federal circuit court. But it will be argued that said section as a regulation of costs applies to said federal court, and that, therefore, the clerk of the latter court has necessarily the incidental power and authority to receive the tender provided for by said section. But this argument, if made, is untenable.

Congress has legislated upon the subject of costs. The prevailing party always recovers his costs. No tender by the adverse party can affect this right. State statutes upon the subject, therefore, have no application whatever to the federal courts. (*U. S. v. Treadwell*, 15 Fed. Rep., 532; *Pentlarge v. Kirby*, 20 Fed. Rep., 898; *Trinidad etc. Co. v. Robinson*, 52 Fed. Rep., 347).

Sec. 914 can apply to no matter upon which Congress has legislated. It speaks only when the other statutes of the United States are silent. (*Wear v. Mayer*, 6 Fed. Rep., 660; *Peaslee v. Haberstro*, 15 Blatch., 472).

(*b*) *There was no order of court directing the clerk to receive the money or assuming control over it after it was so received.*

The courts below held that the law governing this case was that the money in question must have been delivered to the clerk by some direction of the court, in order to be so in his possession by virtue of his office as to render his sureties liable for misapplication. The importance of this point, therefore, from the standpoint occupied below, itself is most important, because, according to it, if there was no order of the court directing the clerk's action, there can be no recovery in this case. The importance, or rather the absolute necessity, that such an order should have been made by the court, appears in this: That, as we shall hereinafter show, there was otherwise absolutely no authority for the clerk's receiving the money. Counsel's position in relation to the order is that, if the court made an order directing the clerk to receive the money, then the court in legal effect took possession or custody of the money, which consequently was not paid to the clerk *qua clerk*, but was paid to the clerk *for the court*, the clerk simply holding it for the court. In other words, the contention of counsel, and the holding below in relation thereto, was simply this: That on the facts in the record the money was not paid to the clerk *qua clerk*, but was paid *into court*. And the question under this head, therefore, is simply this: Was the money, on the facts as found by the trial court, paid into court? We say no. What, then, in the first place, is money paid into court? Mr. Justice Story, in a case on the circuit, (*Ex-parte Prescott*, 2 Gall., 146, Fed. Cas. No. 11388) once said upon this question:

"'Money deposited in court' cannot mean money brought in and deposited *sedente curia*, in the actual manual possession of the court. Such a construction would be against all practice, as well as all legal reasoning. It must therefore mean money, which is deposited subject to the order of the court, be it in whose actual possession it may, whether of a bank or of an officer of the court. In such a case, the bank or officer acts as the mere fiduciary, or depository, of the court, and in legal contemplation the money is in the custody of the court. It would be a contempt of the court for any other person to intermeddle therewith."

We shall not stop at this point to cite further authorities on this question, but shall, for the time being and for the purposes of this discussion, assume that the statement of that great jurist and law writer is correct, and that money is paid into court when, and when only, it is so deposited, be it in whose actual possession it may be, that it is actually subject to the order of the court, and that it makes no difference whether the money be held by the clerk of the court, by the regular depositary, by a special depositary, or by any other instrumentality, a trust company, or any individual or corporation whatsoever. All these different instrumentalities stand exactly upon the same footing, it makes no difference which one holds the money, if only it be subject to the order of the court; in such case it is deposited, that is to say is paid, into court; and if on the other hand the court has not control over the money, that is to say, if it is not subject to its order, it makes no difference where or by whom it may be held, it is not then deposited or paid into court.

Now, we call special attention to one particular point appearing in Judge Story's statement, to-wit: That, wherever the court has control over money deposited subject to its order, its control is supreme, absolute; no other power whatever has any right to meddle with it in the slightest degree, and does so at its own peril, and for attempting to do so would be subject to contempt. Wherever the ultimate title to the money may be, for the time being it belongs only

to the court, and, as the saying is, it is in the custody of the law. No one can take it from such custody. It is not even subject to legal process against the ultimate owner. No one can with impunity seize or move or disturb the court's possession. If, therefore, in any given case the court has not this supreme power over the money in dispute, one can rest assured that it has not been paid into court, it is not deposited in court, it is not in the custody of the law. Now, then, what orders were made by the court in the original case in which the tender was made in relation thereto? Prior to July 2nd, 1894, all that appears in the records of said court on the subject is, (1) a recital in the answer of Henry county in relation to the tender as follows: "And defendant says it at all times has been ready and willing to pay plaintiff said sum ($2525), and now here again tenders to plaintiff said sum in full payment of said bonds and unpaid interest due thereon * * * and now brings the said sum into court" (Rec. 13), and (2) a minute made by the clerk on March 3, 1891, on the records of the court in relation thereto, as follows: "This day comes defendant, by its attorney, and files answer, and tenders to plaintiff and deposits with the clerk the sum of $2525 in payment and satisfaction of his cause of action in the petition set forth."

We say "prior to July 2nd, 1894," for the reason that before that date Watson had died, that any defalcation by him had, therefore, already occurred, and that the court could not, as a matter of course, thereafter acquire for the first time control of said money under such circumstances. So much in passing. We shall refer to this feature of the case later on. Whatever may be the correct view to take of it, we desire now to consider by itself the record as it existed prior to July 2, 1894, for the purpose of determining whether prior to that date the court had secured control of the money deposited with Watson so that it alone had the absolute right and power to dispose of it, and that no one else had any right or power to interfere therewith.

The recital in the answer referring to the fact of tender had no such effect. That recital was nothing but the statement of the defendant, it was binding upon no one and it was inaccurate in saying that the defendant "now brings said sum into court," for the reason that the money was not brought into court but had been paid to the clerk instead of into court. Now, then, before the clerk made the minute in relation to the matter, when nothing had been done but paying the money to him, and filing an answer reciting the fact, did the court have control of the money? Was it within the disposition of the court? Could not the defendant, Henry county, have withdrawn it? For, observe, we have here to do only with the controlling power and authority of the court over the money, because up to this time and for years afterwards the plaintiff in that suit refused to accept the tender or to recognize the money as his, but insisted by his course of conduct in maintaining the position that the money was Henry county's, in which he had no interest or concern whatever. And the question we now ask is this: After the money had been paid to the clerk, after the answer had been filed, and before any minute thereof had been made, could or could not Henry county have legally withdrawn the money without the leave of the court first obtained? If said county had, with only the clerk's consent, immediately withdrawn the money would they have been guilty of contempt of court for interfering with money in the court's custody and control? The asking of these questions is their own answer. Henry county could have withdrawn said money without the court's consent. What interest did the court have in it? It was Henry county's money, paid voluntarily by it to the clerk. No one else claimed it. No one else had any interest in or right to it. The court had not been asked to take control over it, and had not done so. Having been voluntarily paid by Henry county for the use of plaintiff, and having been declined by him, the money remained the county's money, and could have been withdrawn

by it of its own motion, without the leave or license of anyone.

But if this was true before the minute was made by the clerk, showing that the tender had been made and the amount thereof *deposited with the clerk*, that is to say, reciting the facts just as they occurred, that the money had been deposited with the clerk in payment and satisfaction of plaintiff's cause of action, *not that it was brought into court*, as inaccurately stated in the answer, how could such a minute affect the matter one way or the other? If the facts themselves before being written upon the record of the court did not place the money subject to its control so that it could not be withdrawn without its order consenting thereto, how could the writing of the facts upon the record have such effect? The recording of the facts could not change or alter, increase or diminish, their force or effect. They were the same before being recorded that they were afterwards. They meant the same thing. They had the same effect. (*Campbell v. Booth*, 8 Md., 107, 117).

And this, whether the judge signed the minute or not. It will be observed that the trial court below in its opinion states that it appeared affirmatively at the hearing of this case that the minute of March 3, 1891, was signed by the judge, and lays considerable stress upon that fact. The record does not bear out this statement. A critical examination of the special finding of facts made by the court, and upon which its conclusion of law was based, fails to disclose such fact. So far as the record is concerned, it does not affirmatively appear that the judge signed or ever saw said minute. And we apprehend that there is no presumption that such a minute as that minute was seen or signed by him. But we don't care whether the judge signed the minute or not. The minute orders nothing. It directs nothing. It is a mere narrative correctly reciting what had been done between defendant and the clerk. The court

does nothing. The court intimates nothing. The court assumes nothing. If, by signing the minute—assuming for the moment that the judge did so sign it, which we deny—the judge thereby bound the court as to its correctness, it amounts to nothing because it remains still a narrative, reciting that the defendant had paid the money *to the clerk*. And that fact, however it may be told, or by whomever it may be recited, or in whatever form it may be preserved, on paper or stone or iron, means always one and the same thing, and has always one and the same effect. The payment was to the clerk, not to the court, and it makes no difference who tells the story of the payment, whether it be the clerk or the judge or both of them.

Now, as to the proceedings in court on July 2, 1894, and subsequently thereto. Watson died on March 24th, 1892, and any dereliction of duty by him must have been committed prior to that date, and if any liability, in favor of plaintiff herein, and on said bond, exists, it must have accrued prior to that time. If Watson had violated no duty of his office, if he had committed no breach of his bond, in his lifetime, it is impossible to understand how, after his death, such violation of duty or breach of bond could be established against him or his sureties. Was the money in his possession during his lifetime by virtue of his office? If not, that ends the matter, because it never came into his possession by virtue of his office after his death. And no proceeding by the court subsequent to his death, no recording of orders thereafter, could possibly produce a contrary result. Having died innocent of a breach of the bond, no breach could be made by any subsequent order or decree of the court.

The trial court attached great importance to the subsequent proceedings in the original case. In its opinion it said, among other things: "The subsequent record entries in the case show that the court at all times regarded the

money as under its control." We have already remarked that the question in relation to the control had by the court over the money was necessarily confined to the period of Watson's existence, because, unless the court had such control at some moment in Watson's lifetime, the fact of such control could not constitute an element or factor in determining Watson's liability on his bond. If the court never had control of said money in the lifetime of Watson, then, so far as concerns said bond and liability thereon, the court never had such control, and it makes no manner of difference what the court may have thought, or what afterwards the court may have done to secure such control, or even that it actually secured it, or what it may have recited or spread upon its records relative to what it had previously thought or intended or understood. It is true the question is, was it the court's money, *i. e.*, in its possession? But was it its money while Watson yet lived, is the real question. If it became the court's money only after Watson's death, it was, of course, physically impossible for him to take it as the money of the court.

We may examine this subject in yet another light. Wherever money is lawfully paid into court by the defendant for the use of the plaintiff in support of a plea of tender, that is to say, wherever said practice prevails and the money in accordance therewith is actually paid into court, the effect of such payment is to appropriate the amount thereof to the satisfaction *pro tanto* of plaintiff's claim, and to the extent thereof the claim is regarded as paid. Therefore (if indeed, which we deny, Henry county had the right to pay the money into the federal court in lieu of a tender), the inquiry made by us of the trial court, asking if on the facts found by it the plaintiff's claim had been paid, or could plaintiff now compel the payment of the judgment in his favor by Henry county, was not an idle inquiry, but was material and exactly in point.

Because, if Henry county still owes the amount of the judgment, then it has never been paid, and if it has never been paid, it is simply for the reason that the amount thereof was not paid into court. Paying into court was (assuming, for sake of argument, that which we elsewhere deny, that payment could be made into court for such purpose) payment to plaintiff. Therefore, if there was no payment to plaintiff there was no payment into court. The trial court, therefore, erred in declining to answer our inquiry, and it may be that this error led to the court's erroneous conclusion, that the money was in the custody of the court. It may be that had the court carefully considered our inquiry, it would have appreciated and seen and understood how plain and clear was our contention there and here, that the money had never been for a single moment of time in the possession of the court, that the clerk had always held the money in his own personality and individuality, and never for a single instant as the trustee, agent or intermediary of the court.

For surely there can be no pretense that on the facts found in the record Henry county ever paid plaintiff's claim. Will anyone seriously contend that it cannot now be made to pay the judgment rendered against it? Certainly it was the opinion of the court rendering said judgment that its collection could be enforced, for otherwise why render it? The court found that plaintiff was entitled to a judgment for a specified sum on each count of the petition, and then rendered judgment for the aggregate amount of the three sums. If it had been already paid in full by Henry county, why was a judgment rendered therefor?

The rule is, that wherever money is properly paid into court in aid, or in place, of a tender, it immediately becomes the property of the plaintiff, whatever may be the result of the action; if he accepts it in satisfaction of his claim, the matter ends there, but if not it still belongs to him, to be

applied in part payment of his judgment should it exceed the amount of the tender, or in payment of his judgment should it not exceed said amount; and hence it is that the money thus paid is regarded as stricken out of the complaint; belonging to plaintiff, he is no longer suing for it and there is no issue in regard to it. The question is as to the excess over and above that amount claimed by plaintiff. He has been paid to the extent of the money paid into court. The case proceeds to trial, therefore, only upon the question of excess. And the verdict is for or against plaintiff, according as the jury find for or against an excess. In the case of this plaintiff against Henry county the court found against any excess, holding that the amount paid by Henry county to the clerk, Watson, equaled the amount owed by it to plaintiff, but notwithstanding this the court rendered judgment in favor of plaintiff against Henry county for the full amount owed by it to him. Now, this was wrong if the money had been *lawfully* paid *into court* by the county for plaintiff. The debt having already been paid in full, judgment should have been rendered in favor of the county. And this goes a long ways towards showing, if it does not do so conclusively, that the court rendering the judgment (Judge Philips) understood that the money had not been lawfully paid into court. He was perfectly familiar with the rule mentioned here. While upon the bench of the Kansas City Court of Appeals he had written an opinion holding in favor thereof. (*Voss v. McGuire*, 26 Mo. App., 452). The rule is universal. It is not confined to Missouri; it prevails in the other states, as shown by the authorities cited by Judge Philips in that case. It also prevailed in England, and was in fact borrowed from that country by our courts. (*Levan v. Sternfeld*, 25 Atl. Rep., 854; *Turner's Sons v. Lee Gin etc. Co.*, 41 S. W.R ep., 57).

Let us, then, turn to the authorities supporting and illustrating the views expressed under this head.

In Illinois it is held that a clerk is not by virtue of his office a receiver of the court, and is not bound to receive money paid into court as a tender, except upon an order of court; and that money deposited with the clerk without an order may be withdrawn at any time before the court has recognized it as a fund in its control, or the other party has manifested a willingness so receive it. (*Hammer v. Kaufman*, 39 Ill., 87).

In New York (*Baker v. Hunt*, 1 Wend., 103) the defendant paid money to the clerk to satisfy plaintiff's demand; the clerk having returned the money to defendant, plaintiff moved for an order on the clerk to pay it to him. The court denied the motion, saying:

"The clerk had no right to receive the money without a rule of court, and acted correctly in returning the money to the defendant."

In Mississippi defendant paid the full amount of a judgment to the clerk of the court, but there being no statute authorizing the clerk to receive it, the court held it was no legal payment or satisfaction. (*Lewis v. Johnson*, Walker, (Miss.) 261).

In Indiana, prior to 1881, the court uniformly held that in the absence of a law making it the duty of the clerk to receive money handed to the clerk, along with an answer pleading tender, for the purpose of keeping the tender good, no such duty existed, and therefore a clerk and his sureties could not be liable therefor on his bond. (*Casey v. State*, 34 Ind., 105; *Dorpfner v. State*, 36 Ind., 111; *State v. Woodman*, 36 Ind., 511; *State v. Givan*, 45 Ind., 267; *Bowers v. Fleming*, 67 Ind., 541).

In *Casey v. State*, 34 Ind., 105, it was said:

"The only question presented for our consideration is this: Are the sureties liable for money paid into open court and handed to the clerk with an answer of tender for the

purpose of keeping the tender good? There is no law in this state rendering the sureties liable in such a case, there being no law making it the duty of the clerk to receive such money."

In West Virginia the statute on the subject of condemnation of lands provided that "the defendant may pay into court to the clerk" the amount of the compensation fixed by the commissioners. The condition of the clerk's bond was to "account for and pay over, as required by law, all money which may come to his hands by virtue of said office." In a proceeding of that nature in that state the compensation as fixed by the commissioners was paid to the clerk upon the filing of the report, exceptions were filed, and upon hearing the compensation was increased, and the clerk was ordered to pay over the sum deposited with him but failed to pay it. In an action by the landowner upon the clerk's bond against him and his sureties (*State ex rel. Blake v. Enslow*, 41 W. Va., 744; s. c. 24 S. E. Rep., 679) the court said:

"There is no evidence that the money ever was in court or subject to its disposal. *It is true the court made two orders on the supposition that the money was under its control.* The clerk wrote these orders and it is altogether probable that he had already disposed of the money * * * Everyone is presumed to know the law. Hence it must be presumed that the company, in depositing the money in the clerk's hands, and Mrs. Blake, in allowing it to remain for so long a time without objection, when she might have had it herself, were fully informed as to the law, and that their conduct was controlled by their personal trust and confidence in the personal integrity of the clerk, and not from reliance on his official bondsmen. *There was no order of the court showing that it had received the money and placed it under the control of the clerk*, and, therefore, his official bondsmen, if aware of his having the fund, had the right to presume he was holding it on his individual responsibility, with the consent of the depositor, the railroad company, and with the consent of Mrs. Blake, for whom the deposit was made. * * * Nor does the failure of the court to make

any order on the subject change the responsibility. Courts seldom act in such matters on their own motion, and when the parties in interest do not complain, they presume them to be satisfied."

Applying the clear and strong reasoning of the above case to the one here before the court, we may say: There is here no order placing this money in the custody of the clerk *as money paid into court*. No such order was possible, for under the law, as we shall hereinafter see, the only possible order or act the court could have made would be an order placing the money in the registry. If this order had been made and the money thereby had become *money paid into court*, and the court had then delivered it to the clerk to be placed in the depositary, and the clerk, instead of placing it in the depositary, had converted it, a question might then arise as to the bondsmen's liability, entirely different from the present question. But this was never done; the money never became *money paid into court*. It was defendants' money paid to the clerk to keep the tender good. For such money the bondsmen are not responsible. It was money paid to the clerk as an individual, and trusting to his personal integrity. The parties knew the law and assented to the payment. For years it was never accounted for by the clerk as a fund in court, and was never treated or considered such. The parties had a right to make this arrangement if they saw fit, and it was not the duty of the court to object. A defendant, anticipating judgment against him, may place money in a clerk's hands to satisfy such judgment when rendered, as he may in the hands of any third person, but such money will not be held by the clerk *virtute officii*. If it be said that if the money was not *paid into court*, it was *paid to the clerk*, and *received by him in a cause pending in the court*, and was, therefore, subject to Section 995, and the clerk was bound to place it in the depositary, the answer is that, in the legal sense, it was not "*received* by the *clerk*," but by the individual. The clerk had no possible right or

duty to receive it. Tender money paid to the clerk and not into court is not paid to the clerk as clerk, and is never held by him as clerk.

In New Jersey, by the statute, condemnation money, if not accepted, is to be paid into court. In a proceeding of that nature (*National Docks etc. Ry. Co. v. R. Co.*, 28 Atl. Rep., 673) the money had been paid to the clerk, and, he defaulting, suit was brought upon his bond against him and his sureties. The court said:

"The clerk is not the court. He is merely the scribe and custodian of its records. He is not the agent of the court, nor has he any authority to act for or represent the court in its absence. In the discharge of its judicial duties, a court can have no agent or representative. The clerk of the circuit court does not possess the legal shred of judicial power. He has no power to decide what is money, nor in what circulating medium payment, in such a case, must be made, whether in coin or currency. For anything that appears to the contrary, this payment was made to the clerk, not in the presence of the court, but in its absence, and without its knowledge, and without any order or rule being entered on its minutes, or other record being made. * * * It has long been settled that when a defendant in a suit at law desires to pay the sum, which he admits to be due, into court, in discharge of his liability, to the plaintiff, he can only do so under an order or rule of the court in which the suit is pending, and that a payment to a clerk in such a case in the absence of an order or rule, is not a payment into court. The usual statement is that the clerk has no authority to receive money for the court without a rule. The Supreme Court of this state has recently enforced this doctrine. (*Levan v. Sternfeld*, 55 N. J. Law 41; 25 Atl., 854). * * * In the absence of statutory direction or a special order, or a general regulation, the clerk, in my judgment, has no more authority to receive money in such a case for the court than he has to decide what sum shall be paid, or what shall be received as money, or where the money shall be placed for safe keeping, or to whom it shall be paid. As a general rule, money cannot be paid into the English Court of Chancery without a rule."

In a very recent Tennessee case (*Turner's Sons v. Lee Gin etc. Co.* 41 S. W. Rep., 57) the origin of the practice of paying money into court in aid, or in place, of a tender, and the procedure therein, are discussed at great length. The court said:

"'The rule of bringing money into court was introduced in the time of Charles II to avoid the hazard and difficulty of pleading a 'tender.' In proper cases, when the dispute is not whether anything, but how much, is due to the plaintiff, the defendant may have leave to bring into court any sum of money he thinks fit, and the court makes a rule, that unless the plaintiff accepts it, with costs, in discharge of the action, it shall be struck out of the declaration, and paid out of the court, to the plaintiff or his attorney; and the plaintiff, upon the trial, shall not be permitted to give evidence for the sum brought in.' (*Tidd Prac.*, *619). The motion for leave to bring money into court is a motion of course, and should be regularly made before plea pleaded. (*Id.* *621). Bringing money into court is, in general, considered as an acknowledgment of the right of action to the amount of the sum brought in. The plaintiff, therefore, on producing an office copy of the rule, is entitled to receive it at all events, whether he proceed in the action or not, and even though he be non-suited, or have a verdict against him. (*Id.* *624). In speaking of non-suiting, Tidd says: 'When money is brought into court, unless the plaintiff will accept it, with costs, in discharge of the suit, it is considered as paid before action brought, and struck out of the declaration; and the action proceeds as to the residue of the demand in like manner as if it had been originally commenced for that only.' (*Id.*). The practice of bringing money into court under the general rule is as follows, to-wit: 'When money is brought into court, the plaintiff either accepts with costs, in discharge of the suit, or proceeds in the action. In the former case, he should take an office copy of the rule and procure an appointment thereon from the master or deputy to tax the costs and serve the same on the defendant's attorney; or in default thereof, it will be considered that the plaintiff intends to proceed in the action to recover a larger sum than that paid into court. * * *

If the plaintiff proceed in the action, the sum brought into court is, by the terms of the rule, to be struck out of the declaration and to be paid out of court, to the plaintiff or his attorney; and upon the trial of the issue the plaintiff shall not be permitted to give evidence of the same. In such case, if the plaintiff proceeds to trial otherwise than for non-payment of the costs, and does not prove more to be due to him than the sum brought in, the plaintiff, on the rule being produced, shall be non-suited, or have a verdict agaist him, and pay costs to the defendant. * * * But if more appear to be due him, he shall have a verdict for the overplus and costs. * * * But the plaintiff is entitled to costs up to the time of bringing the money into court.' (*Id.* 626; *Keith v. Smith*, 1 Swan, 92). This case was tried in the circuit court in 1849, and decided by our Supreme Court in 1851. It was an action of assumpsit for work, labor etc. The pleas were non-assumpsit and notice of set-off. There was no plea of tender at all. The parties had been in crosslitigation, and in the last suit defendant offered as set-off a judgment previously rendered in his favor, and to avoid the effect of this setoff plaintiff had tendered the amount of this former judgment, which was refused. It will be noticed that this case was decided before the act authorizing payment of tender to the clerk, taken from the Alabama Code of 1852, and while money could only be paid into court by the debtor, under some rule made. The syllabus is as follows: 'Tender in Court, How Made. To be available, a tender made in court must be under a rule of court, and accompanied by a payment of proper costs up to that time.' In such cases, of course, the payment into court must be made upon the terms imposed by the rule. If the general rule is adopted, then the form and practice laid down by Tidd must be observed. If a special rule is made, then the payment must be in accordance with the terms imposed by the special rule. The court said: 'It seems that the plaintiff tendered the amount of this judgment to avoid it as a set-off, and the tender was refused; he then paid the money to the clerk of the court for the use of the defendant, but it was not received by the defendant. The facts in this part of the case are so indistinctly stated that we cannot assume anything definite upon them. The object of the plaintiff doubtless was to avoid the effect of the set-off in reference to the matter of costs, now amounting to the

sum of $540.' 'But it does not appear that the money offered as a payment of the judgment was paid into court under an order or rule of the court authorizing it to be done. If a party bring money into court he must do so under a rule of the court, and upon payment of proper costs up to that time. The debt so paid will thereupon cease to form any part of the future litigation in that behalf, and the other party will be entitled to receive the money. (1 *Tidd Prac.*, 620).' 'The proper practice in this respect seems not to have been adopted in the present case.' Evidently the court was here considering the practice of the payment of money into court under the general rule as laid down by Tidd, and where the legal scope and effect of such payment was prescribed by the terms of the rule itself. (See *Caruth Lawsuit*, p. 226, note 2; *Thomp. & S. Code*, Sec. 2926, note). Such rule can have no application to the tender of money, and the payment thereof to the clerk, under a statute which imposes no terms whatever, but leaves the effect of tender and acceptance to the general principles applicable to such cases. Unquestionably, under the practice as thus laid down by Tidd, and followed in the case of *Keith v. Smith*, 1 Swan, 92, the rule of the court under which money was paid into court prescribed the terms upon which it was placed in court, and the terms upon which it might be withdrawn, and these terms would be such as the court should see proper to make. We have already shown what the general rule was when the court did not prescribe any special provisions or conditions. And in many cases the practice was as contended for by plaintiff, to-wit: that he might withdraw the amount paid in, and continue his litigation for the balance claimed. In such case the amount thus withdrawn is stricken from the claim, and, in the event the plaintiff is successful to the full amount claimed, he only gets judgment for the balance. But since the code of 1858 the tender of money and payment into court is made under that statute, and not under a general rule of court. This, of course, refers to payments generally, and not to payments made under special rules prescribing conditions and terms."

In Colorado the statutes provide that the clerk shall give a bond conditioned that he will faithfully perform his duties as clerk, and punctually pay over to the persons legally

authorized to receive the same, all moneys that may come into his hands by virtue of his office. An assignee, having in his possession money of the assigned estate which could not then be distributed, amounting to $3,500.00, turned the same over to the clerk. Afterwards, the clerk having failed to account for a large portion of the money, the assignee instituted two actions on the clerk's bond against him and his sureties. A demurrer was sustained to both complaints, and the Supreme Court sustained this action in an opinion which contained much matter that is interesting reading here (*People to use v. Cobb*, 51 Pac. Rep., 523). On the question as to whether the clerk had received the money by virtue of his office, the court there said:

"We are therefore to consider whether the acts charged against Adams amounted to a violation of his official duties. Of course, it was his duty, as it is the duty of every person, to account for money intrusted to him, and for any failure in such respect he would be personally liable; but that he would be honest in his dealings, and faithfully discharge his duties as a man and a citizen, was no part of the undertaking of his sureties. They undertook only for his faithful discharge of his official duties, and the payment by him of moneys which he might receive as clerk. He could receive money as clerk only in the discharge of some duty imposed upon him by law. Now, no authority to receive the money deposited with him by Howard can be found in the statutes prescribing and defining the duties of clerks of the district court. Independently of statute, he would be bound to take charge of moneys brought into court in pursuance of a judicial order, but the complaint distinctly states that the money was deposited without such order. Payment to a clerk of money which he is not by law, or some order of the court, authorized to receive, is not a payment into court. (*State v. Enslow*, 41 W. Va., 744; 24 S. E., 679; *Brown v. People*, 3 Colo., 115). And speaking generally, delivery of money to an officer to whom it is not legally payable is not a payment, and the sureties on his bond are not liable for his conversion or misappropriation of the fund. (See, also, *San Luis Obispo Co. v. Farnum*, 108 Cal., 562; 41 Pac., 445; *People v. Hilton*, 36 Fed., 172)."

The clerk had represented at the time the deposit was made that he had authority to receive the money. As to the effect of that representation, the court said:

"In one of the complaints is an averment (not found in the other) that, when the deposit was made, Adams represented to Howard that he (Adams) was, as clerk, authorized to receive the money without any order of the court. But this in no way strengthens the plaintiff's case. It was the conclusion, or pretended conclusion, of Adams as to the extent of his legal authority in the premises. His sureties are liable for his abuse of an authority which he possessed, but they are not liable for the consequences of his pretention to an authority which he did not possess. Howard is presumed to have known the law, and therefore to have been uninfluenced by the representation."

The clerk had entered the fact of the deposits upon the records of the court. As to the effect of that action on the part of the clerk, the court said:

"It is also argued that the entry of the deposit on the records of the court in some way operated to make it a fund in court. An unauthorized entry by the clerk is no part of the records of the court. An order by virtue of which money is paid into the court must come from the court itself, and an entry by the clerk of money as being in court, no matter in what form or in what book, without such order, is nugatory. From the facts which the plaintiff lays before us, it is clear that Adams received the deposit in his individual capacity, and not by virtue of his office."

The court had, in thirty-five days after the deposit was made with the clerk, made an order of record directing him to pay out of it the sum of $531.00, which he did, and several years afterwards had made an order directing his successor to pay over the balance for distribution among the creditors, which she did not, because she had never received any part of the money from the said clerk. As to the force and effect of said orders by the court, the Supreme Court said:

"But it is insisted that the subsequent orders in relation to the money had the effect to make it a fund in court. The complaint alleges that on the 15th day of September, 1892, the court ordered that the clerk should pay from this money a certain, specified amount, which he accordingly did. The theory of the complaint, as also of the argument, is that the court, by this order, approved or adopted or ratified the act of the clerk in taking the money. A principal may ratify an act done by his agent in excess of the authority given, or one may adopt the act of another who assumed to be an agent, but was not, in such manner as to estop himself to deny that the other was his agent. But the relations existing between a court and its clerk are not those of principal and agent, and the law of estopel does not apply to courts. Orders, judgments and decrees are made and rendered by the court in the exercise of its judicial functions, and these cannot be delegated. The clerk cannot, either expressly or by implication, be invested with the authority of the court. Doubtless, the court, upon being advised that there is money which has been placed in the hands of its clerk without its sanction may, in a proper case, order the clerk to pay it into court. When paid in, it would become a fund in court, by virtue, not of the original deposit, but of the order. *Judicial orders are not to be deduced by implication.* They speak for themselves, their meaning is to be found in their terms, *and it is not allowable by speculation or far-fetched inference, to give them an effect outside of their language.* The order we are considering was to pay a certain sum from money in the clerk's hands. At the time the order was made the money was not a fund in court; it had never been made so; and, the order was not that the payment be made out of a fund in court. The order affected the clerk in the capacity in which he held the money; it could not affect him otherwise; and, as he did not hold the money officially, it amounted only to a direction to him personally. By no system of reasoning could it operate to convert the money in the clerk's hands into a fund in court, *or to relate back, and make the original deposit a deposit in court.*"

And on the same subject, *i. e.*, the force and effect of said orders, and more particularly as to the intention of the

court as shown thereby in relation to the action of the clerk in receiving the deposit, the Supreme Court further said:

"We have discussed the orders on the basis of the statement in the complaints concerning it; but, if we were to accept counsel's theory of the effect of such an order, we would be without the data necessary to an intelligent idea of what this one really was. Why it was made; at whose instance; on what showing, and in what proceeding; to whom the money was to be paid, and for what purpose, the complaints do not disclose. If it were permissible (which it is not) to seek for the intention of the court in respect to the deposit, as such intention might be implied from the circumstances, and give it the effect of an order different from the one actually made, before we could commence our search we would have to be in possession of the unstated facts. *Furthermore, at the time of the entry* of the order *Adams may have already squandered all of the money except the amount he paid.* If he had, he did so before the money was in his hands as clerk, and before any responsibility on account of it had attached to his sureties. *No order of court* could make them answerable for a defalcation for which *they were not responsible at the time of its occurrence.* They cannot be held beyond the letter of their obligation. It was incumbent upon the plaintiff to set forth every fact necessary to fasten a liability upon them, and an important fact not stated, was the ability of the clerk at the time to turn the money into court. What we have said concerning the first order applies to the second, but it may be remarked, in addition, that it appears very plainly from the complaint that the money had been embezzled by Adams long before the latter order was made."

(*c*) *The court had no power to direct payment to Watson except for the purpose of being forthwith deposited in a proper depositary of the United States.*

We have elsewhere seen herein that the federal clerks as such have no authority to receive money offered by a defendant in aid, or in place, of a tender. We have already seen (*supra*, subd. *a.*) and will again see (*infra*, subd. *d.*) that the federal courts themselves have no power

to order or authorize the payment into court of money for that purpose. But assuming that said courts have such power, then whenever they exercise it and direct the payment into court of said money they must necessarily designate the person to whom payment shall be made. Now, Section 995. R. S. U. S., provides:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer or a designated depositary of the United States, in the name and to the credit of such court; *Provided*, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under direction of the court."

And Section 996 provides:

"No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn."

Under these statutes officers of the United States cannot retain possession of money paid to them by virtue of their respective offices, but they must forthwith deposit the same in the proper depositary. Where money is received by them under their general authority they must deposit the same in the depositary designated by general rules and regulations upon the subject, but where money is paid to them, not by virtue of their offices, but for the court, and by direction of a special order and for a special purpose, like money paid into court by defendant in aid, or in place, of a tender, then the order must itself designate the depositary and the disposition to be made of the money. To illustrate, if the court should in such a case order payment of the money to be made to the clerk, he would not receive it as clerk,

because it is not his duty as clerk to do so, and the order was not made to pay it to him because he was clerk; payment to any other person might just as well have been ordered, and, therefore, no general rule or regulation relative to the depositaries for money paid to the clerk would answer. The order itself would have to make special provision in relation thereto.

(*d*) *Because federal courts in actions at law have no authority to order payment into court of money in aid or in place of a tender.*

We have hereinbefore seen (Div. II, sub-d. *a*) that the Missouri statutes on the subject have no application to the federal courts. There is no federal statute directly bearing upon the subject. The English practice was not a part of the ancient common law of England, and, therefore, does not prevail in this country. The English practice was not introduced until the reign of Charles II. (*Levan v. Sternfeld*, 25 Atl. Rep., 854). There is, therefore, no authority for the practice in the federal courts of this country. If authority existed, the money should be deposited into court, not merely delivered to the clerk.

(*e*) *Even if the court took action equivalent to an order directing payment of money to Watson, he did not receive same as clerk.*

This necessarily follows from what we have already hereinbefore said. It was not the duty of the clerk as clerk to receive the money. There was no binding statute on the subject. There was no general rule of court or practice upon the subject. The money could not be paid to the clerk as clerk. Therefore, if an order was made by the court directing payment of the money to the clerk, and in pursuance thereof he received it, he received it, not in the discharge of his duties as clerk, but in obedience to the order which might just as well as not have named any other person whomsoever instead of him. In receiving the money he was,

in the case supposed, acting not as clerk, but as receiver of the court. And, therefore, his bond as clerk would not be liable for any defalcation thereof.

(*f*) *There was, therefore, no breach of his bond by Watson.*

He neither received nor held the money by virtue of his office. The money was doubtless paid to him under the mistaken apprehension that the Missouri statute applied to and governed his office, but this was a mistake. That statute had nothing to do with his office, or with the court of which he was clerk. He received the money absolutely without authority for so doing. There was no federal statute authorizing it. There was no general rule of court authorizing it. There was no special rule or order made in that particular case authorizing it. The court never afterwards made an order taking charge of and control over the money. The court had no power to order payment to be made to the clerk except for the purpose of being forthwith transmitted by him to the proper depositary. In this case no depositary was designated for receiving this money. The money was paid to the clerk to be kept by him. This the clerk had no authority as clerk to do, and the court itself could not legally have authorized it. It was in direct conflict with the positive mandate of the statute. (R. S. U. S., Sec. 995). In short, the money was paid to Watson, in law, whatever else the parties may have understood and intended in fact, not as clerk, but as Watson. The wrong done by him, therefore, in not accounting for it, was not the clerk's wrong, but Watson's. And to Watson the aggrieved party or parties must look, and not to his bond.

Respectfully submitted,

SANFORD B. LADD,
FRANK HAGERMAN,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

FREDERICK HOWARD, JAMES L. LOMBARD and JOHN C. GAGE,
Plaintiffs in Error,
vs.
THE UNITED STATES to the use of DAVID D. STEWART,
Defendant in Error.
No. 121.

In Error to the Circuit Court of Appeals for the Eighth Circuit

ADDITIONAL BRIEF FOR PLAINTIFFS IN ERROR.

SANFORD B. LADD,
FRANK HAGERMAN,
for Plaintiffs in Error.

JOHN C. BOYARD, PRINTER, N. Y. LIFE BLDG., KANSAS CITY, MO.

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We avail ourselves, on behalf of plaintiffs in error, of the permission granted in the order of the court re-submitting this case, to file this additional brief. It is not our purpose, however, to re-argue the case, but only to refer, somewhat more precisely and consecutively, to the several Acts of Congress involved in the discussion, correcting some slight errors in citations; to summarize briefly the conclusions of law for which we contend, and the grounds on which those conclusions are based; and in a few instances to answer some objections offered to the weight and applicability to this case of decisions cited in our former brief.

STATEMENT.

The suit was brought by David D. Stewart in the name of the United States to his use as plaintiff against the defendants. The breach alleged in the complaint was the failure of said Watson, as clerk, to pay over and account for $2,525 paid to him as such clerk for the use and benefit of plaintiff in a certain suit in said Court wherein defendant in error was plaintiff and Henry County was defendant.

The bond was executed March 3, 1887, was in the ordinary form prescribed by the law, the penalty being twenty thousand dollars, and the condition that Watson should "faithfully perform all the duties of said office and seasonably record the decrees, judgments and determinations of said Court." The facts out of which the breach alleged arose are fully set forth in the record and are referred to at length in our original brief, and in substance, are as follows:

On the 6th day of September, 1887, the use plaintiff, David D. Stewart, was the holder of three bonds of Henry County, Missouri, two for $1,000 each, and one for $500, the interest on said bonds having been paid up to September 1st, 1887. At the option of the county, these bonds were payable at any time after July 1, 1887. The bonds were payable at the National Bank of Commerce, New York. On September 6th, 1887, Henry County deposited in the National Bank of Commerce $2,525 in payment of said bonds with interest then accrued. Stewart refused to accept the money and it remained in the bank until February 6th, 1891, when Stewart brought suit in the United States Court

against Henry County for the principal of the bonds and interest from September 1st, 1887. On March 3rd, 1891, Henry County filed answer in the case. The minute of this filing is as follows: "This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of $2,525.00 in payment and satisfaction of his cause of action in the petition set forth." The answer so filed set up the tender at the Bank of Commerce, renewed this tender "*as full payment*" of said bond and unpaid interest due thereon on September 6th, 1887, and concludes with the words: "and now brings the said sum into court." On February 11th, 1895, the case having been submitted to the Court without a jury, a finding of the issue made by the plea of tender was made in favor of Henry County, and the following judgment was rendered:

"It is therefore ordered and adjudged by the Court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars ($2,525.00) the aggregate amount found to be owing under the three counts of the petition, and that plaintiff pay the costs of this action and that execution issue therefor."

Watson died in 1892 and neither he nor his representatives ever accounted for any part of the $2,525, so placed in his hands, and it is admitted that he embezzled it.

The facts are much more fully and minutely set forth in the record, ard, in our original brief, but the above are sufficient for the purposes of this additional brief.

ADDITIONAL BRIEF.

The Act of Congress under which this bond was given, was approved February 22nd, 1875, and is to be found in 18 Stats. L. 333, and in Supp. Rev. Stats., Vol. 1, 2nd Ed. p. 65, and is as follows:

"Sec. 2. That whenever the business of the courts in any judicial district shall make it necessary, in the opinion of the Attorney General, for the clerk or marshal to furnish greater security than the official bond now required by law, a bond in a sum not to exceed forty thousand dollars shall be given when required by the Attorney General, who shall fix the amount thereof."

"Sec. 3. That the clerks of the Supreme Court and the circuit and district courts, respectively, shall each, before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court for which he is appointed, to the United States, in the sum of not less than five, and not more than twenty thousand dollars, to be determined and regulated by the Attorney General of the United States, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk;

And it shall be the duty of the district attorneys of the United States, upon requirement, by the Attorney General, to give thirty days notice of motion in their several courts that new bonds, in accordance with the terms of this act, are required to be executed; and upon failure of any clerk to execute such new bonds, his office shall be deemed vacant.

The Attorney General may, at any time, upon like notice through the district attorney, require a bond of increased amount, in his discretion, from any of said clerks within the limit of the amount above specified; and the failure of the clerk to execute the same shall in like manner vacate his office.

All bonds given by the clerks shall, after approval, be recorded in their respective offices, and copies thereof from the records, certified by the clerks respectively, under the seal of court, shall be competent evidence in any court. The original bonds shall be filed in the Department of Justice."

The original legislation of Congress requiring and prescribing the terms of these bonds is found in the Judiciary Act of 1789, 1 U. S. Stat. L. 76, and is as follows:

"Sec. 7. * * * And the said clerks shall also severally give bond with sufficient sureties (to be approved by the Supreme Court and district courts respectively) to the United States in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."

This act remained in force until March 3, 1863, when a further act was passed, 12 Stats. at large, p. 768, permitting the judges of the several courts to fix the amount of the penalty of the bond, but not otherwise changing its terms and conditions. No further change was made until February 22nd, 1875, when the act was passed, 18 U. S. Stats. L. 333, which is now embodied in the Revised Statutes, as above stated.

Two questions arise in this case:

First. Is it the intention of this legislation that the bonds so required shall be bonds for the protection of the United States solely, or is it intended that they shall be for the protection of individuals as well, or has any person other than the United States, a right to maintain an action upon any such bond? The above is a statement of the same question in two forms.

Second. If the bond is intended for the protection of individuals, was the embezzlement by Watson of the money deposited with him, and his failure to account for it, a breach of the bond, or covered by the condition of the bond, and a breach of that condition for which this suit can be maintained?

I.

1st. Was it intended that the bond required by these statutes to be given by the clerk, should be for the benefit and protection of individuals, and one upon which persons other than the United States, might maintain a suit? In determining this question, the general rule must be remembered that only the party named in any bond or other instrument is presumed to have any interest in the obligations incurred. There are a vast number of officials employed by the United States acting under bonds to the government, or to some officer of the government, as its agent, conditioned as this bond is, for the faithful performance of the duties of their offices, and of all this great number there are only a few cases in which the bonds have been held to be intended for the benefit of individuals, and in each of these cases, special provisions of law are made, conferring the right to maintain suits for the breaches, regulating the manner in which suits may be brought, expressly stipulating that in all such suits the government shall be under no liability for the costs, declaring that any judgment recovered in such suit for the penalty of the bond, shall stand open for the use of other parties similarly situated, and providing some limitation within which the suit must be brought. In not a single instance has a recovery ever been permitted upon any bond conditioned

as this bond is conditioned unless such statutory provisions permitted the recovery and governed the proceeding. It is also a well known fact that there are throughout the country an almost innumerable number of officials acting under bonds conditioned for the faithful performance of their offices, executed to the state, or county, or city, or town, or some officer representing the government, and that of this great number very few of the bonds are intended to protect outside persons, but that they are for the benefit of the obligee named only; and, of those few, where they are made for the benefit and protection of individuals, in almost every instance, the statute creates the liability and regulates the enforcement. In a very few instances where the conditions of the bonds are such as to certainly indicate an intention to protect the rights and interests of individuals, it is held that the right of such individuals to sue ought to be inferred and may be inferred. In this case, where there is absolutely nothing indicating any right of any person other than the obligee named in the bond, the United States, to use it for his own benefit, we submit that there is no room for such inference, and we submit that the further fact that in all the history of the government, no recovery has ever been had on any official bond conditioned as this bond is conditioned, unless such recovery is permitted by statute, and that no recovery has ever been had on any official bond of a clerk to the United States, however conditioned, without such permission, withone exception (in *re Finks*, 41 Fed. Rep. 383), is a very pregnant and important fact to be considered in this connection.

2nd. The condition of this bond is antique in its form, and is a relic of days long past, of distant colonial times.

Some of the greatest judges we have ever had have passed upon the meaning of this condition and its scope, in cases arising in different states, and their construction of the meaning and intent of the legislatures in prescribing that condition for the bonds of clerks of the courts, has been that such bonds enured only to the obligee therein named, the government which required them. Such a case was *Crocker v. Fales*, 13 Mass. 262, a very early Massachusetts case, brought upon the bond of the Clerk of the Court of Common Pleas, the condition of the bond being precisely the condition of this bond, and the statute prescribing that bond having been passed in 1786. We have cited from this case quite fully in the original brief, at page 9. And it will appear from an examination of it, that the Massachusetts court at that time, 1816, were of the opinion that under the circumstances of that case, which are precisely the circumstances of this case, it was not the intent of the legislature to "secure to individuals an indemnity for such omissions by the clerk as would be injurious to them."

In the case of *Auditor, etc. v. Dryden*, 3 Leigh, 703, an early Virginia case, President Tucker delivering the opinion, went back to 1705, a period of over 125 years, to consider what was the intention of the legislatures in requiring the bonds of the clerks of the courts in this form. The suit was not the suit of an individual, but of the state. A statute had made it the duty of the clerk to collect certain license taxes and account for them, and the clerk had collected such taxes and failed to account therefor. It was the opinion of this learned judge, that it was the intention of the legislature in requiring this bond to secure indemnity for the state only, for the faithful performance by the clerk of his clerical duties, and not of the duties which had been imposed upon him by

law as a license collector. It is said that this decision has no bearing upon the present case. It is claimed by the defendant in error that the condition for the faithful performance of the clerk's official duty is all-embracing, that it is only necessary to establish some default, and that right of action necessarily follows to the party injured, whether an individual or the government. This case holds that this condition in bonds given by clerks is not all-embracing, but that it has a settled and established meaning, and that this has been the construction given to this language from the earliest times. This rule of decision is destructive to the entire contention of counsel for defendant in error.

In *McCue v. Young*, 10 Wheaton, 406, the opinion was rendered by Mr. Chief Justice Marshall. The suit was on a bond given by the manager of a lottery to the Corporation of Washington, in pursuance of an ordinance, and conditioned truly and impartially to execute the duty vested in him by the ordinance. The manager had failed and refused to pay to the holder the prize drawn by a certain ticket in the lottery, and the suit was brought by McCue in the name of the Corpotation of Washington to his use, to recover the amount of the prize for which the manager had defaulted. Counsel for defendant in error very earnestly contend that this case has no bearing whatever upon the present. The manager of this lottery was exercising a franchise granted to him by the Corporation of Washington, which had proper authority to grant it. The bond was in the nature of an official bond to secure his proper execution of the powers granted. He had failed in the most important particular, but that failure was injurious only to an individual. Chief Justice Marshall, deciding the case, said: "The proprietors of the ticket No. 1037 have shown no right to sue on this bond. Their remedy is certainly against

Gideon Davis; and in the event of his insolvency, it may be against the managers." He further said, "if the proprietors of one prize ticket have an interest in this bond, the proprietors of every other prize ticket had the same interest; and it could not be in the power of the first bold adventurer, who should seize and sue upon it, to appropriate it to his own use and to force the obligees to appear in court as plaintiffs against their own will. No person who is not the proprietor of an obligation can have the legal right to put it in suit unless such right be given by the legislature; and no person can be authorized to use the name of another without his assent given in fact or by legal intendment." The case does decide that in order to create a right of action in an individual upon a bond given to the public authority, conditioned for faithful performance of duties, it is not enough to show a breach of duty injurious to some individual of the public. Such recovery cannot be had by any person other than the obligee, "unless such right be given by the legislature," and there can be no "legal intendment" of such right, arising out of the mere fact of the giving of the bond, the existence of the duty, and the injury of the individual by the breach of that duty. The case is directly and strongly in point, and if it be sound law, completely overthrows the contention of the defendant in error. There are many other similar cases, but we refer to these three because these decisions were rendered by very great judges, whose learning and knowledge of the exact intention of the legislatures in those early days in the use of such forms give great weight to their opinion. We submit, therefore, that the proper construction of these acts of Congress is governed by the very highest authority, and that under these authorities no such meaning can be attributed to them as is claimed.

3rd. The Attorney General of the United States is required to fix the amount of the penalty in these bonds within the prescribed limits. We have seen that the penalty was fixed absolutely from 1789 to 1863 at two thousand dollars by the act of congress. From 1863 to 1875, the penalty was in the discretion of the judge of the court. By the act of 1875 the penalty within prescribed limits is in the discretion of the Attorney General of the United States. The Attorney General of the United States is the official head of its legal department, and has special knowledge of all litigation in which the United States is interested. He has no special knowledge, by virtue of his office, of the general litigation pending in the courts. He knows no more than any other individual lawyer in Washington, or any remote city, about the nature and extent of litigation, other than that of the United States, pending, or liable to be pending, in any court in Missouri. If this bond was intended merely for the protection and security of the government of the United States, the Attorney General is the proper officer to fix the penalty of the bond. If it was intended to cover other liabilities in which the United States has no interest, and in favor of individuals, the Attorney General is a most improper person to discharge that duty. The judge of the court of which the clerk is clerk is the person who alone could properly determine the amount of bond required to secure individual litigants. The fact that this authority is given to the Attorney General is a most significant one, and ought to be conclusive in the absence of any other circumstance to the contrary, that the intent of the legislature was to secure only liabilities in favor of the United States.

4th. The penalty of the bond, up to its highest limit, is no more than sufficient to furnish adequate security to the United States against defaults of the clerk. In some of the courts, especially some of the district courts, the interest of the United States in the security of moneys deposited in court, is very large, and also in the faithful performance by the clerks of their other official duties, besides the payment of money. On the other hand, the bond of the clerk, up to its highest extreme limit of twenty thousand or forty thousand dollars, is utterly insufficient to protect the interests of individuals litigant in the courts. The history of these statutes must be remembered. Up to 1863, the highest bond that could be required of a clerk was two thousand dollars. It would be absurd to suppose that the congress of the United States intended by a penalty of two thousand dollars to protect the interests of individual suitors in the courts. It is equally absurd to-day to suppose that they have any such intention when the limit of the bond is twenty thousand or forty thousand dollars. In great railroad foreclosure cases, now frequent in some of our courts, vast amounts are required to be deposited in court for the payment of expenses, fees and costs, and where bondholders became purchasers, and are permitted to use, to some extent, their bonds in payment of the purchase price of the property foreclosed, it is also necessary that large amounts should be deposited in court for the benefit of minority bond-holders who do not enter into the reorganization schemes, and hundreds of thousands of dollars in single cases are frequently deposited in this way. Other large deposits are constantly made. And the bond of twenty thousand or forty thousand dollars is often insufficient to cover one per cent of the liability for moneys on deposit in a single case.

If it be true that congress intends by a bond so insignificant under the circumstances, to protect individual liabilities, then congress has in many cases provided for the protection of individuals to the extent of less than one per cent, and left them unprotected to the extent of more than ninety-nine per cent. Indeed it would seem to be an impossibility to provide by an adequate bond for the protection and security of individuals in such cases, as the bond required would be too great in amount for any ordinary clerk to give, and the expenses of giving such bond would not be justified by the salaries allowed to clerks.

5th.—Congress has made other adequate, complete and effectual provision for the protection and security of all suitors in courts of the United States, and this from a very early day.

By an act of Congress, approved April 8, 1814, 3 Stats. L. 127, it was provided: "That upon the payment of any money into any district or circuit court of the United States to abide the order of the court, the same shall be deposited in such incorporated bank as the court may designate, and there remain, until it shall be decided to whom it of right belongs; provided that if, in any judicial district, there shall be no incorporated bank, the court may direct such money to be deposited according to its discretion. *Provided*, also, that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties under the direction of the court"

By act of March 3rd, 1817, 3 Stats. L. 395, it was provided: "That it shall be the *duty of the judges* of the circuit and district courts of the United States, within sixty days from and after the passing of this act, in all districts in which a branch of the Bank of the United States is or shall be established, to cause and direct all moneys remaining in said courts respectively, to be deposited in such bank, in the name and to the credit of the court, and a certificate thereof from the cashier of said bank stating the amount and time of said

deposit to be transmitted, within twenty days thereafter, to the Secretary of the Treasury; and, in districts in which no such branch bank is or shall be established, such deposits may be made in like manner and within the same time in some incorporated state bank within the district, in the name and to the credit of the court.

Sec. 2. That all moneys which shall hereafter be paid into said courts or received by the officers thereof, in causes pending therein, shall be immediately deposited in the branch bank within the district, if there be one, and otherwise, in some incorporated state bank within the district, in the name and to the credit of the court.

Sec. 3. That no money deposited as aforesaid shall be drawn from said bank except by the order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk, and, every such order, shall state the cause in or on account of which it is drawn.

Sec. 4. That if any clerk of such court or other officer thereof, having received any such money as aforesaid, shall refuse or neglect to obey the order of such court for depositing the same as aforesaid, such clerk or officer shall be forthwith proceeded against by attachment for contempt.

Sec. 5. That at each regular and stated session of said courts, the clerks thereof shall present an account to said court of all moneys remaining therein, or subject to the order thereof, stating particularly on account of what causes said moneys are deposited, which account, and the vouchers therefor, shall be filed in court. *Provided, nevertheless*, that if in any district there shall be no branch bank of the United States, nor any incorporated state bank, the court may direct such moneys to be deposited according to their discretion."

These two acts were specially repealed by the act of March 24, 1871, 17 Stats. L. p. 1, which was as follows:

"That all moneys in the registry of any court of the United States, or in the hands or under the control of an officer of such court which were received in any cause pending or adjudicated in such court shall within thirty days after the passage of this act be deposited with the treasurer, an

assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court. And all such moneys which are hereafter paid into such courts, or received by the officers thereof, shall be forthwith deposited in like manner; provided, that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties, under the direction of the court.

Sec. 2. That no money deposited as aforesaid shall be withdrawn, except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk, and every such order shall state the cause in or on account of which it is drawn.

Sec. 3. That at every regular or stated session of said courts, the clerks thereof shall present an account to said courts of all moneys remaining therein or subject to the order thereof, stating in detail in what causes said moneys are deposited and in what causes payments have been made, which accounts and vouchers thereof shall be filed in court.

Sec 4. That if any clerk or other officer of a court of the United States shall deposit any money belonging in the registry of the court in violation of this act, or shall retain or convert any such money to his own use, or to the use of any other person, he shall be deemed guilty of embezzlement, and on conviction shall be punished by a fine of not less than five hundred dollars and not more than the amount embezzled, or by imprisonment for a term of not less than one year nor more than ten years, or both, at the discretion of the court.

Sec. 5. That if any person shall knowingly receive from a clerk or other officer of a court of the United States, any money belonging in the registry of said court as a deposit, loan or otherwise, in violation of this act, he shall be deemed guilty of embezzlement, and shall be punished as provided in the last preceding section.

Sec 6. That the act entitled 'An Act directing the disposition of money paid into courts of the United States,' approved April 18, 1814, and the act supplementary thereto, approved March 3rd, 1817, be, and the same are hereby repealed."

The only changes in the law as prescribed by this last statute are those wrought by the revision of the statutes. Section 1 of the act has become Section 995 of the present Revised Statutes, and has been changed by striking out all that part of the section requiring all moneys at that time in the registry of the courts to be deposited with the treasurer, assistant treasurer or depositary within thirty days, and otherwise the section is unchanged. Section 2 of the act is now Section 996 of the revised Statutes. Section 3 of the act is now Section 798 of the Revised Statutes. Section 4 and 5 of the act are sections 5504, somewhat amended, and 5505 of the Revised Statutes.

We call especial attention to these provisions of the statutes, not only for the purpose for which we here cite them, as affording the necessary protection to individual suitors in the courts, but also because counsel for defendant in error claim to find in these same statutes authority expressed and implied for the handling of moneys paid into court by the clerks. We here see that these provisions were first enacted by Congress in 1814, and in 1817, and remained in force until 1871, as so enacted, and that during all that period, up to the year 1863, the penalty of the clerk's bond was at all times two thousand dollars. It must also be noticed that the strenuous and almost severe language of the act of 1817, directed to the judges of the court to see to it that all moneys on deposit in the court, should be within the short time stated, placed in a safe depositary, and requiring the judges to punish for contempt any failure of a clerk to obey the orders of the court requiring such deposit, implies very strongly that wrongs and abuses were in existence which required a summary and decisive remedy. Unquestionably, the act of 1814 had not been obeyed, and the clerks

had loaned the moneys committed to their charge and distributed it among their friends in the manner that so many public officials have been in the habit of doing with similar money, and that losses had thereby occurred which were scandalous to the administration of justice, and therefore, this act was directed to the judges of the several courts, requiring them to take the matter in hand, and see that the law was obeyed and enforced and that suitors in the courts have proper protection and security. In 1871, it appears from the form of the act then passed that this law had not been fully obeyed. We are told that "for more than a century the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner"—that is, that the clerks, as clerks, had received the money, and kept it, and paid it out, while the law had directed, during almost the entire period, that it should be received, kept and paid out in an entirely different manner; but the first section of the act of 1871 would seem to recognize the fact that there were in the hands or under the control of some officers of the court, moneys which were received in causes pending or adjudicated therein. This could only be so by reason of disobedience to the existing law. Section 4, the penal section of the act, can only have application to such cases as that. The money then in the registry of the court and deposited in the incorporated bank, could only be drawn by the order of the judge, and no clerk could, by any possibility, deposit any of those moneys in violation of the act, or convert them to his own use or to the use of any other person. The security furnished for individual suitors, by these laws, rendered any embezzlement or misuse of moneys paid into court an absolute impossibility. Under these acts, the money cannot be placed

in a depositary without an order of the court designating what depositary it shall be placed in, whether the treasurer or an assistant treasurer of the United States, or some one of the many authorized depositaries in each district. The clerk has no power whatever to make this judicial selection. He cannot pay the money to any depositary until this order is made. It is suggested that there must be some time between the actual payment into court and the arrival of the money at the depositary, and that the duty of taking the money to the depositary may be properly and legally entrusted to the clerk. The law provides that it shall be *forthwith* placed in the depositary. An order of the court is necessary selecting the depositary and directing this act. There is no interval of time between the bringing of the money into court and the making of this order. The money never is paid into court and never can be until such order is made. There is no authority of law for handing the money to the clerk and leaving it with him until the proper order is secured. When that order is made, we submit that it is the duty of the judge to see to it that the money is placed in the depositary. He may take the risk of sending it either by the marshal or the clerk, or any other person whom he may see fit to trust with it, but in the contemplation of law, the money goes forthwith, instantly, from the presence of the court into the designated depositary. The proper certificate of deposit "*in the name and to the credit of the court*" is delivered to the court and the money from the moment of its payment into court is in contemplation of law, safe from any misfeasance of the clerk or of any other officer of the court. This security is ample. The treasurer of the United States is responsible for all the millions that may ever be involved in any litigation. The responsibility of the selected depositaries is presumed to

be ample. The provisions of the law are complete and perfect. All that is required is that the judges should do their duty. The parties litigant and interested in the deposit of moneys have full opportunity to see that the money comes safely into the depositary. In fact, the better practice, and one that has been frequently employed, is, when application is made to pay money into court, to make an order directing the parties to pay the money into the selected depositary and return the certificate in the name and to the credit of the court, to the court, and thereupon to make the order stating that the money is paid into court. and the purpose of it. As compared with any bond that might be exacted, this security is of far higher character. It does not in the least impair our argument, to say that, by the neglect of the court and the carelessness of the parties, and their failure to see to it that the money which they attempt to pay into court, is actually paid in, may be lost. The United States has never undertaken to guarantee parties litigant against their own ignorance and carelessness, or the mistakes or neglects of the courts.

That the security of the clerk's bond is an amount barely sufficient to protect the interests of the obligee, the United States; that it is utterly insufficient to protect the suitors litigant in the courts; that, if it be held that individuals have the right to use it for their own protection, the security of the government may be impaired or destroyed; that Congress has provided thorough, ample and sufficient security for the litigants in all possible cases, would seem to be considerations that ought to have great weight in determining this question.

II.

In re Finks.

The case *in re Finks*, 41 Fed. Rep., 387, has been so often cited and commented on by counsel for defendant in error and by the courts below in their decisions, and it seems to be regarded as so high and persuasive as authority that it demands our special attention. It is also the only case in which the sureties of a clerk of a court of the United States have been held liable, except to the United States; and it is also the only case in which sureties have ever been held under similar circumstances. But it is a "bad eminence" to which this case is thus exalted. The decision evinces complete ignorance of the statute prescribing the terms and form of the bonds of clerks. It says:

"It is one of the conditions of the official bond of the clerk to properly account for all money coming to his hands as required by law, and he having failed to do so in this case, the court is of the opinion that the sureties on his official bond are bound for the deficit."

It never was the condition of any official bond of a clerk that he should properly account for moneys. Any bond containing that condition was not an official bond. It may have been a common law bond, and it may as such have been valid and imposed liability in favor of individuals, but, whatever construction is placed upon it, is not a construction either of the bond or the statute now under consideration.

III.

The plaintiffs in error also contend that even if the law permitted individuals to make use of this bond for their own protection, and it was intended for the protection of individ-

uals, still no breach of the condition of this bond is shown either in the complaint in the case, or in the facts of the case as found by the court below. The statement in the complaint is, (Rec. 3-4): "Thereafter on the day of March, 1891, said Henry County did deposit with said Warren Watson, as clerk of this court, under and pursuant to an order of said court to that effect, the sum of $2525." The entry upon the court record was as follows: "This day comes defendant, by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of $2525 in payment and satisfaction of his cause of action in the petition set forth. Thereupon, a stipulation waiving a trial by jury is filed herein." (Rec. 13). It has already been stated that this sum of $2525 was a tender previously made to Stewart at the Bank of Commerce in New York. The judgment rendered by the court in the case was for the sum os $2525, and costs were adjudged against the plaintiff, the tender being held good. It is necessary to determine what was the legal significance and effect of this act. We contend:

(1st.) That it was not *a payment of money into court.* The general rule is that to constitute payment into court, it must be done under a special rule or order of court. On this subject several authorities are cited in our original brief. There is no method known to the law whereby payment can be made unless the thing paid be accepted by the party opposite, except by payment into court. A debtor can tender and offer to make payment, but unless the tender be accepted there is no payment, and no power to compel acceptance; but when the creditor brings his debtor into court and asks judgment for his debt, the debtor may then bring into court any sum

of money which he sees fit, and pay it into court, although it be less than the amount demanded, the court will receive that payment, and the creditor cannot refuse it. Whether he takes the money or not, it stands as a payment *pro tanto* on his debt. Now to accomplish this, a special order of the court is and always has been necessary. That special order is to the effect that the defendant comes and pays the money into court for the use of the plaintiff in the case, and grants to the plaintiff proper time to determine whether he will accept it and desist from his suit. If he does accept it, the costs are taxed against the defendant, and he is required to pay them, and the plaintiff receives his money. If he does not see fit to desist from his suit, he may still take the money, and the amount so paid to him is stricken from his declaration and he is allowed to proceed for the remainder claimed. If he fails to show a debt larger than the amount paid, judgment goes against him and for the defendant. In this manner, and in this manner only, can the money paid into court become the money of the opposite party. It does not happen, however, that in all cases, the party for whose benefit the money is paid, is entitled to receive it immediately. It may be that the plaintiff in the case may hold securities for the debt, which the defendant is entitled to receive upon its payment, and the order of the court will then be that, upon his depositing those securities for the use of the defendant, he is to take the money out of court. There are many other cases in which the right of a party to receive money paid into court for his benefit is subject to conditions. A clerk cannot be the judge in these matters. It is not left to him to say whether the party for whose benefit the money is deposited is to take it unconditionally or upon the performance of some condition. It is for this reason that it is held

that to constitute payment into court a special order to that effect is necessary. No such order was made by the court in this case. If it be the law that to make good a tender the amount tendered must be paid into court, it certainly was not done in this instance. This is the rule regarding payment into court without reference to the statutes which have been cited governing payment into court. Under these statutes, in order to constitute payment into court, there must also be an order naming the depositary and placing the money in that depositary. The statute absolutely requires that such an order is necessary to constitute the act of paying money into court. If this view is correct, there can be no liability in favor of Stewart upon this bond, for the reason that the money deposited never became his money. More than this, Stewart took judgment and the court gave judgment in his favor against Henry county for $2525. He is estopped from saying that the $2525 deposited with Warren Watson was his money, by this judgment. The judgment may have been wrong, but it was taken by the plaintiff and at his instance, and stands as the judgment of the court. Stewart cannot be permitted now to say that this $2525 had already been paid to him by the deposit in the hands of the clerk after having taken judgment against Henry county for the sum.

2d. It is suggested that this deposit was made pursuant to a statute of the State of Missouri, and that under the statute of the State of Missouri, the clerk of the United States Court is authorized to receive tender money in such cases where, but for such statute, he would have had no such right. If the statute of Missouri could have any force in this case, the deposit made did not comply with it. The law referred to is Sec. 2937, Rev. Stats. of Missouri, 1889, and is

as follows: "In all actions where, before suit brought, tender shall be made and full payment offered by discount or otherwise, in such specie, and at such time and place, as the party by contract or agreement ought to do, and the thing tendered, if in money, *shall be deposited in court*, but if not money, committed under an order of court to the sheriff or other officer of court for the use of the plaintiff before the trial of the case shall commence, and the party to whom such tender shall be made doth refuse the same, and yet afterwards will sue for the debt or property so tendered, the plaintiff shall not recover any costs in such suit, but *the defendant shall recover costs* as if the judgment in the case had gone in his favor upon the merits." Now, it must be noticed that in order to relieve the defendant from costs by depositing the money tendered in a case where there has been a prior tender, the statute is that the money must be "deposited in court" "for the use of the plaintiff," so that under the statute, as by the general rule outside of the statute, in order to save himself from costs, the party must pay the money into court. In the case at bar there had been a prior tender. But it must be also noticed that under this statute, the party may relieve himself from all costs in the suit by paying the money into court "*before the trial of the case shall commence.*" It is not necessary to deposit the money with the clerk in order to keep the tender good. When the case comes up for final trial, if he produce the money in court before the trial is commenced, and if a good prior tender is shown, the party is relieved from all costs in the case. A more complete answer to this suggestion is that the only effect of this statutory provision is to regulate the matter of costs, and as we have fully shown in our original brief, the matter of costs is entirely regulated by a law of congress, and any at-

tempt to do so by State statutes can have no effect in United States courts. Another Missouri statute which has been quoted here is Sec. 2939, and is as follows:

"*Tender in court after suit brought. When plaintiff shall pay all costs from the time of such tender.* If in any suit pending, the defendant shall at any time deposit with the clerk for the use of the plaintiff the amount of the debt or damages he admits to be due together with all costs then accrued, and the plaintiff shall refuse to accept the same in discharge of his suit, and shall not afterwards recover a larger sum for his debt or damage due, and costs accrued up to the time of deposit, than the sum so deposited, he shall pay all costs that may accrue from and after the time such money was so deposited as aforesaid."

It will be seen that this provision applied only to cases of tender in court where there has been no prior tender, and that it is also a statute regulating costs. There is a further provision of the Missouri statutes that a defendant may plead and show tender at any time prior to suit brought, and without depositing the money with the court or clerk, and if he proves a good tender on the trial, the plaintiff can recover no intetest after the time of such tender. In no possible view of the case can the Missouri Statutes be held to confer authority on the clerk of the United States court to accept and hold the deposit made in this case. What, then, was its effect? It was simply a voluntary act on the part of Henry county depositing this sum of money in the hands of Warren Watson, the clerk, which it might just as well have kept in its own hands or have deposited elsewhere. The act had no legal significance. The clerk could not have taken the money in his official capacity as clerk, because his official capacity only extends to the discharge of the duties of his office. It is no more a part of the duties of his office to take and hold

this money than it would be to take and hold the money of parties to a case litigant in his court for the purpose of paying their attorney fees, or of paying for such judgment as might be rendered against them in the case.

IV.

A question was suggested in the brief of counsel for defendant in error as to the jurisdiction of this court in this case. Upon the argument the objection was urged somewhat more confidently. There ought to be no question as to the jurisdiction in this case.

The writ of error from this court to the Circuit Court of Appeals is a matterof right in all cases where the judgments of the Court of Appeals are not made final, and the matter in controversy exceeds two thousand dollars. The judgments of the Court of Appeals are made final only in cases where the jurisdiction (of the Circuit Court) is dependent entirely upon diversity of citizenship.

In this case diversity of citizenship of the parties is alleged for the purpose of invoking the jurisdiction of the Circuit Court of the United States, but it appears upon the face of the petition that the plaintiff's cause of action arises upon a bond executed by defendants as securities, for a Clerk of the United States Circuit Court, an office created by the laws of the United States, and a bond being given in pursuance of a statute of the United States prescribing its form and all its various details.

If, as is contended by plaintiffs in error, these statutes of the United States did not create the liability claimed in the petition, the question raised in this case might have well been raised by demurrer to the petition. It appeared

clearly and unmistakeably upon the face of the petition that the case necessarily involved the construction of the statutes of the United States, and this is sufficient.

In *Sonnentheil v. Christian Moerlein Brewing Company*, 172 U. S. 401, a suit had been brought in the circuit court, where a verdict was rendered for the defendants, and the case taken by appeal to the Circuit Court of Appeals, and the judgment of circuit court affirmed. Thereupon the plaintiff sued out a writ of error from this court to the Circuit Court of Appeals, and the jurisdiction of this court in the case was challenged. The Court said:

"In this case the plaintiff Sonnentheil was a citizen of the state of Texas; the defendant Brewing Company was a corporation created by the laws of Ohio, and a citizen of that state; and Dickerson a citizen of the state of Texas; but it also appeared upon the face of the original petition that Dickerson was marshal of the United States for the Eastern Division of Texas, and that he made the seizure of the goods in question through his deputy John H. Whalen, and under a writ of attachment sued out by the Brewing Company against Freiberg, Klein & Co. as defendants. It thus appears that the jurisdiction of the circuit court did not depend entirely upon diversity of citizenship between the plaintiff and the Brewing Company. * * * Had the jurisdiction of the circuit court been originally invoked solely upon the ground of diversity of citizenship, the case would have fallen within the *Colorado Central Mining Company v. Turck*, 150 U.S. 138, but as the original petition declared against Dickerson as marshal, for an official act as such, that case has no application."

In *Auten v. United States National Bank*, 174 U. S., 125, the case was in error to the Circuit Court of Appeals. This court said:

"To sustain the motion to dismiss, it was contended that the jurisdiction of the case depends on diversity of citizenship, and hence that the judgment of the Circuit Court of Appeals is final, but one of the defendants (plaintiff in error)

though a citizen of a different state from the plaintiff in the action (defendant in error) is also a receiver of a national bank, appointed by the Comptroller of the Currency, and is an officer of the United States, and an action against him is one arising under the laws of the United States. *Kennedy v. Gibson*, 8 Wall. 498; *in re Chetwood*, 165 U. S. 443; *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S., 401. It is, however, urged that such an appointment was not shown. It was not explicitly alleged, but we think that it sufficiently appearedand the motion to dismiss is denied."

See also Pacific Railroad Removal Cases, 115 U. S., 1.

In concluding, we wish to suggest the important consequence of a decision holding that this bond, conditioned for the faithful performance of the official duties of the clerk, can be sued on by any other party than the United States. If that is to be the law, there is no reason why the rule should not be applied to all similar bonds given to the government; and if that rule is to be applied to all such bonds given to the United States, there is no reason why it should not apply to bonds given to states and municipalities. The reasons we have given why the intendment claimed should not be permitted in this case, do not exist in the cases of other officers. No provision whatever has been devised by Congress for the protection of individuals from injuries received by misfeasance in office of postmasters, mail carriers, collectors, or any other officers who give similar bonds. The only safe rule to apply is, that, unless there is in the form of the bond or the statute prescribing it, direct permission or clear legal intendment, amounting to permission to the individual to sue, no such suit can be maintained.

Respectfully submitted,

SANFORD B. LADD,
FRANK HAGERMAN,
for Plaintiffs in Error.

No. 121.

Brf. of ~~Krauthoff~~ Stew

SUPREME COURT OF THE UNITED S

Filed Jan. 16, 1902.

OCTOBER TERM, 1901.

No. 121.

FREDERICK HOWARD *et al.*,
Plaintiffs in Error,
vs.
THE UNITED STATES *to the use of*
DAVID D. STEWART.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

J. V. C. KARNES,
ALEXANDER NEW,
EDWIN A. KRAUTHOFF,
For David D. Stewart, Defendant in Error.

DAVID D. STEWART,
Of Counsel.

HUDSON-KIMBERLY PUB. CO., KANSAS CITY, MO.

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES *to the use of*
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STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error directed to a circuit court of appeals, and at the threshold the Court (as has been said before) is confronted with the ever-recurring question of jurisdiction.

A petition was filed in the Circuit Court of the United States for the Western Division of the Western District of Missouri, wherein the United States of America, "at the relation and to the use of David D. Stewart" (Rec., p. 4), a citizen of the State of Maine (3), prayed judgment against Howard, Gage, Lombard and McDonald, "citizens and residents of the State of Missouri," and inhabitants of the district in which they were sued (3) for an amount in excess of two thousand dollars, exclusive of interest and costs (4).

The action being to the use of Stewart, he is regarded as the real party in interest, and his citizenship is diverse from that of the defendants, and the requisite amount in controversy is involved, and the jurisdiction of the Circuit

Court in the first instance is maintainable on the ground of diverse citizenship.

Browne *v.* Strode (1809) 5 Cranch, 303;
McNutt *v.* Bland (1844) 2 How. 9;
Maryland *v.* Baldwin (1884) 112 U. S. 490.

"The circuit courts of the United States have original cognizance, concurrently, with the courts of the several States, of all *suits of a civil nature*, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and *arising under* the Constitution or *laws of the United States*, or treaties made under their authority."

1 Foster's Fed. Prac. (2 Ed.) Sec. 15;
24 Stat. at Large, ch. 373, p. 552.

By the sixth section of the Act of March 3, 1891, creating the circuit courts of appeals, "the judgments * * * of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States."

26 Stat. 826, ch. 517.

"The jurisdiction referred to is the jurisdiction of the Circuit Court, and * * * the jurisdiction of the Court of Appeals is made final in all cases in which the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship."

American Sugar Ref. Co. *v.* New Orleans (1901) 181 U. S. 277, 280.

It is further provided that "in all cases not hereinbefore, in this section (Section six), made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars besides costs."

Northern Pacific Railroad *v.* Amato (1892) 144 U. S. 465, 471, 472.

The primary object of this act was "to facilitate the prompt disposition of cases in the Supreme Court, and to

relieve it of the enormous overburden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigations."

McLish *v.* Roff (1891) 141 U. S. 661, 666;
In re Woods (1892) 143 U. S. 202, 203;
Lau Ow Bew *v.* United States (1892) 144 U. S. 47, 55.

So the decisive test of the jurisdiction of the Supreme Court to review a judgment of a circuit court of appeals on a writ of error issued as a matter of right, as distinguished from a certiorari issued by the Supreme Court or a certified question issued by a circuit court of appeals, is thus determined:

(*a*) Does the suit arise under the Constitution or laws of the United States; or,

(*b*) Does the jurisdiction of the Circuit Court in the first instance attach solely by reason of diverse citizenship?

Under the first alternative of this proposition, the Supreme Court has jurisdiction; under the second alternative, the jurisdiction of the Supreme Court does not exist, and the writ of error should be dismissed.

There is no dispute in this case about the Constitution of the United States, so we are remitted to a consideration of the term, "*laws of the United States.*"

"Cases arising under the laws of the United States are such as grow out of the *legislation* of Congress."

Ellis *v.* Norton (1883) 16 Fed. Rep. 4, 5 (Pardee and McCormick, JJ.)

In Blackburn *v.* Portland Gold Mining Co. (1900) 175 U. S. 571, and Shoshone *v.* Rutter Mining Co. (1900) 177 U. S. 505, the term "laws of the United States" was assumed to mean an "act of Congress."

In re Barry (1844) 42 Fed. 113, 120 (affirmed *sub nom.* Barry *v.* Mercien (1846) 5 How. 103, cited with approval, *In re* Burrus (1890) 136 U. S. 586, 597), the words "laws of the United States" were considered as meaning an act of Congress. "The jurisdiction of the United States courts depends exclusively on the Constitution and *laws of the United States*, and they can neither in criminal nor civil cases re-

sort to the *common law* as a source of jurisdiction." (42 Fed. 113, 120.) The right to the possession of a child not depending "upon any act of Congress," the matter was held not to arise under the laws of the United States. (136 U. S. 594.)

Hence it follows, before the jurisdiction of the Circuit Court could attach in the first instance independent of diverse citizenship, it must appear the suit arises under an act of Congress. So that the plaintiffs in error invoke the jurisdiction of this court on the ground, the suit arises under an act of Congress, and then seek to defeat a recovery on the bond sued on, by a contention that the suit does not arise under an act of Congress because there is no act of Congress under which a cause of action arises or a suit can be maintained in favor of Stewart.

"Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the circuit courts of the United States under the express terms of the Act of August 13, 1888, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2,000 and the defendant be properly served within the district."

Illinois Central Railroad Co. *v.* Adams (1901) 180 U. S. 28, 34.

Stewart, a citizen of Maine, can prosecute any cause of action whatever for an amount exceeding two thousand dollars against plaintiffs in error, citizens of Missouri, in a circuit court of the United States for the proper district. His right to recover goes to the merits and is not a jurisdictional question. Thus in Murray *v.* Chicago, etc., Ry. Co. (1894) 62 Fed. 24, the *jurisdiction* of the Circuit Court attached by reason of a removal from the State court (62 Fed. 42). The right to recover was maintained on common-law principles. Affirmed (1899) 92 Fed. 868.

It is true that Stewart alleged that Warren Watson had been appointed clerk of a circuit court of the United States (Rec., p. 3), but this allegation of itself does not present a suit arising under the laws of the United States.

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses."

Shoshone Mining Co. *v.* Rutter (1900) 177 U. S. 505, 507.

"The mere fact that a suit is an adverse suit authorized by the statutes of Congress is not in and of itself sufficient to vest jurisdiction in the Federal courts." (*Ib.*, 513.)

"The writ of error in this case was brought under Section six of the judiciary Act of March 3, 1891. If the judgment of the Circuit Court of Appeals was final, under that section, this writ of error must be dismissed. In order to maintain our jurisdiction it must appear that the jurisdiction of the Circuit Court was not dependent solely upon the opposite parties being citizens of different States. * * * This question must be answered upon an inspection of the declaration of the plaintiffs in the Circuit Court. Does it disclose that the plaintiffs invoked the jurisdiction of that court because the parties were citizens of different States, or because the case was alleged to be one arising under the Constitution, laws, or treaties of the United States."

Florida, etc., Railroad Co. *v.* Bell (1900) 176 U. S. 321, 325.

In Blackburn *v.* Portland Gold Mining Co. (1900) 175 U. S. 571, it was held a controversy between rival mining claimants which was claimed to arise under two sections of the Revised Statutes of the United States did not so in fact arise, and that it was not a cause of which a circuit court of the United States could take original jurisdiction unless the requisite diversity of citizenship and amount involved existed.

In Trafton *v.* Nougues (1877) 4 Sawy. 178; Fed. Cas. 14134, Judge Sawyer said: "Where a suit presents no disputed construction of an act of Congress; where there is no contest at all as to what the act means, or what rights it gives; where the only questions are as to what are the local mining laws, rules and customs, and as to whether the parties have in fact performed the acts required by such local

laws, rules and customs, how can it be said, in any just sense, that such a suit 'really and substantially involves a dispute or controversy' arising under an act of Congress."

In the case at bar, Judge Adams said on the Circuit: "The *defences* are two: First, that the relator (Stewart) is not authorized to sue on the bond in question because the United States of America is the sole obligee, *and no statute* of the United States authorizes a suit thereon at the relation and to the use of an individual; second, that the clerk did not take possession of the money tendered by virtue of his office as clerk." (Rec., p. 23.)

These are the only defences insisted on by plaintiffs in error in this court. (See Brief for Plaintiffs in Error.)

In the Blackburn case the Court repeated what Chief Justice Marshall and Chief Justice Waite (in each instance speaking for the Court) had previously said: "A case may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either, or when the title or right set up by the party may be defeated by one construction of the Constitution of the United States, or sustained by the opposite construction." (175 U. S. 580.)

In Colorado, etc., Co. *v.* Turck (1893) 150 U. S. 138, a writ of error issued to a circuit court of appeals was dismissed for want of jurisdiction in the Supreme Court to review the case. It was said that when "the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of a suit depends upon some question of a Federal nature, it must appear, at the outset, from the *declaration or the bill of the party suing*, that the suit is of that character." (150 U. S. 143.) "The Federal question now suggested did not emerge until the defendant set up its second defence," but "the jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred." (150 U. S. 144.)

In the Blackburn case, the Turck case was reviewed,

and it was said: "As the record did disclose a controversy between claimants arising under a Federal mining statute, it is a necessary implication of the decision that that fact alone did not render the case one of which the Circuit Court could take jurisdiction, irrespective of citizenship, but that other and apt allegations were required showing that the controversy was determinable by one of two conflicting constructions of the Federal statute, and not one of mere fact in which the validity of the statute was not drawn into question." (175 U. S. 585.) So that the second of the two defences, that the clerk did not receive the money by virtue of his office, is "one of mere fact in which the validity of the statute was not drawn into question," and that defence cannot give this court jurisdiction of the cause.

Seeberger *v.* McCormick (1899) 175 U. S. 274 was held to present a question of "general law, and not one to be solved by reference to any law, statutory or constitutional, of the United States," and hence it was decided, no Federal question was presented. (175 U. S. 280.)

In McCain *v.* Des Moines (1899) 174 U. S. 168, 177, it was asked: "How can it be said upon such facts that any question arises under the Constitution or the laws of the United States? The claim of the complainants will not be defeated by one construction of that clause in the Constitution or sanctioned by the other."

So in the case at bar, whether, as Judge Adams said, *by legal intendment*, as distinguished from a statutory provision, a private suitor may sue on the bond of a clerk of a court, is not a question of statutory construction, or, to put it in another way, the right of Stewart to maintain this action is not defeated by a construction that the act of Congress does not of itself or in express terms authorize the action. Whether under principles of general law, as distinguished from an act of Congress, as decided by the Circuit Court and the Circuit Court of Appeals, this action can be maintained, does not present a question of a Federal nature.

In Bausman *v.* Dixon (1899) 173 U. S. 113, a receiver appointed by a Federal court was held suable in a State court. "It is true the receiver was an officer of the Circuit Court, but the validity of his authority as such was not

drawn in question. * * * The liability (of the receiver) to Dixon (the injured party) depended on principles of general law applicable to the facts, and not in any way on the terms of the order" appointing the receiver. (173 U. S. 114.)

In Third Street, etc., Company *v.* Lewis (1899) 173 U. S. 457, an appeal from a circuit court of appeals in a suit in equity to the Supreme Court was dismissed for want of jurisdiction. It was said: "The Circuit Court of the United States has no jurisdiction, either original or by removal from a State court, of a suit as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim (citing authorities). If it does not appear at the outset that the suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed; and lack of jurisdiction cannot be supplied by anything set up by way of defence. And when jurisdiction originally depends on diverse citizenship the decree of the Circuit Court of Appeals is final, although another ground of jurisdiction may be developed in the course of the proceedings." (173 U. S. 460.)

In Pope *v.* Louisville, etc., Ry. Co. (1899) 173 U. S. 573, a suit brought by a receiver appointed by a Federal court was held not to arise under the laws of the United States. "The liability of defendants (to the receiver) *arose under general law*, and was neither created nor arose under the Constitution or laws of the United States." (173 U. S. 579.) "The bill nowhere asserted a right under the Constitution or laws of the United States, *but proceeded on common-law rights of action.*" (173 U. S. 578.)

In conjunction with this line of cases, we consider it proper to cite to the Court some cases which may be relied on to support the jurisdiction of the Court.

In the Pacific Removal Cases (1885) 115 U. S. 1, a suit against a corporation, organized under an act of Congress, was held to be "one arising under the laws of the United States," because "the charter of incorporation not only creates it, but gives it every faculty which it possesses. * * * This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States."

(115 U. S. 13.) But a clerk of a court, even of a circuit court of the United States, is not so limited. As Judge Caldwell said: "Under the law and the practice of *all the courts*, State and Federal, it was the official duty of the clerk to receive and safely keep the money." (Rec., p. 37.)

In Gableman *v.* Peoria, etc., Railway Co. (1900) 179 U. S. 335, it was held a receiver appointed by a Federal court could not remove a case brought against him to the Federal court on the ground that it arose under the laws of the United States. The Court, however, was particular to say: "Nor are the cases against United States officers as such, or on bonds given under acts of Congress * * * in point." (179 U. S. 339, 340.)

With respect to a marshal of the United States, a right of action is given against him by "the laws of the United States, which make the marshal responsible for trespasses committed by him in his official character." (172 U. S. 405.) The law referred to is Section 784, Revised Statutes of the United States, "which *expressly gives the right of action.*" (109 U. S. 424.) So that with respect to a marshal, a statute expressly gives a cause of action and therefore a suit against him on his official bond arises under the laws of the United States.

Feibleman *v.* Packard (1883) 110 U. S. 421;
Sonnentheil *v.* Christian Moerlein Brewing Company (1899) 172 U. S. 401;
Bachrack *v.* Norton (1889) 132 U. S. 337.

But in Walker *v.* Collins (1897) 167 U. S. 57, it was held a marshal of the United States, sued individually for trespass, could not remove a case to the Federal court as one arising under the laws of the United States.

In Auten *v.* United States National Bank (1899) 174 U. S. 125, an action against a receiver of a national bank was held arising under the laws of the United States.

We have thus presented some of the authorities on the subject to enable the Court to solve for itself the question of jurisdiction. It is a question which the Court is bound to consider and cannot be waived by counsel. The question is presented in a peculiar way. The petition filed in

the Circuit Court alleged a diversity of citizenship and the necessary jurisdictional amount. It then alleged that Warren Watson, as clerk, had given a bond conditional for the faithful performance of the duties of his office and had made a breach of his bond. A judgment was rendered in favor of Stewart in the Circuit Court and affirmed by the Circuit Court of Appeals. The sureties on the bond sued out a writ of error from the Supreme Court on the ground the suit is one arising under the laws of the United States, and then invoke as a defence that, under no possible state of facts, can a suit arise under the laws of the United States.

II.

It is asserted by plaintiffs in error: "The bond here is the statutory bond. About this there has been and will be no dispute. * * * (It) created the statutory liability and none other." (Brief, p. 8.) It is of course a convenient method of disposing of a plaintiff to outline his position and then demolish it. It is true Watson was appointed a clerk of a court of the United States and that he gave a bond with the conditions prescribed by statute. But the bond sued on is to be construed as any instrument in writing, according to its terms. If a statute requires a bond to be taken and then gives to the bond a construction or effect which it otherwise would not have, then, of course, such statutory construction is binding. But where a bond is given, whether pursuant to statute or not, and no statute limits or controls the meaning of the bond, then, whether the obligation be treated as a statutory one or one to be determined according to the principles of the common law, the result is the same: The sureties bound themselves that the clerk would "faithfully perform all the duties of the said office of clerk."

"It needs no statute to enable an officer to give a valid bond for the faithful payment of money that may come into his hands, and if we regard the bond in suit as a common-law obligation without looking for aid to the statute which the parties undertook to follow in drafting it, it will

be seen that the fair import of the language used is that the bond was intended for the benefit of all whom it might concern—that is, anyone who should be injured by the treasurer's official delinquency. * * * The statute contemplates that the State shall stand as trustee for the parties who have the beneficial interest in such cases."

State *v.* Wood (1889) 51 Ark. 205, 209, 210 (Cockrill, J.)

In this connection, we call particular attention to the language of Judge Cooley in Bay County *v.* Brock (1880) 44 Mich. 45, 6 N. W. Rep. 101:

"This is an action upon the official bond of Martin W. Brock, late sheriff of Bay County, brought by Houghtaling and Romeyn, who allege as their injury the neglect to levy an execution issued to him upon a judgment in their favor, and a false return thereon. The case in the court below turned upon the validity of the bond, which unfortunately had not been framed in conformity to the statute. The statute requires the bond to be given to the people of the State in the penal sum of $16,000, with condition that if the principal obligor shall well and faithfully in all things perform and execute his office of sheriff during his continuance in office by virtue of his election, without fraud, deceit or oppression, and pay over all moneys that may come into his hands as sheriff, then the obligation to be void, otherwise of force. Comp. L., Sec. 551. The purpose of the bond is sufficiently indicated by the condition; it is to protect and give indemnity to all persons in whose favor a duty may arise, to be performed by the sheriff, and who may be damnified by neglect or failure in performance. The State, or what is equivalent, the people of the State (People *v.* Love, 19 Cal. 676) is made the obligee, as mere naked trustee for those who might become entitled to the protection of the bond, and who, of course, can never be known at the time the bond is taken, but will be pointed out by such subsequent events as charge the sheriff with a duty in their favor. * * *

"The defect in the bond now under consideration is that it names the county of Bay as the nominal trustee instead of the State. For this reason it is said to be absolutely void,

and the parties who have relied upon it as security, who themselves had and could have had no voice or influence in shaking or taking it, but who had a right to suppose that the public authorities, charged with a duty in the premises, would correctly perform that duty, are now, in consequence of this error, left to suffer the loss of important rights without redress. It seems, at first blush, a very small error to have such important consequences, for the obligee named in the bond has no active duty whatever to perform, being neither consulted when the bond is taken nor afterwards when it is sued, and having, in fact, no control over it except as a public officer holds it for safe-keeping.

"If the several duties which the sheriff is called upon to perform could only arise because of the statute requiring the giving of the bond, there would be abundant reason for saying that until a bond in conformity with the statute was produced, no recovery could be had. But this statute does not impose the duties; they would be the same if no official bond were required, and a sheriff *de facto* is charged with them under the same circumstances as is a sheriff *de jure*. It needs no statute to enable the officer to give a valid bond to perform any such duty; and had Brock executed to Houghtaling and Romeyn a common-law bond, conditioned that he would duly levy and return the execution they placed in his hands, there could have been no doubt of its validity. United States *v.* Tingey, 5 Pet. 115; Thompson *v.* Buchannon, 2 J. J. Marsh, 416; Governor *v.* Allen, 8 Humph. 176; Montrille *v.* Haughton, 7 Conn. 743; Commonwealth *v.* Wolbert, 6 Binney, 292. And any bond that may voluntarily be given to a party for his benefit will be equally valid if given to another for him. Van Hook *v.* Barnett, 4 Dev. 268.

"And in the case last cited this principle was applied to the bond of office of an administrator, which, though given to the county justices when the statute required it to be given to the governor, was held to be a valid common-law bond and available as such to any person in whose favor a cause of action against the administrator might arise. I can see no difficulty in the application of this doctrine to the bond now in suit except that the damages to which a

sheriff may become liable to different persons may indefinitely exceed the penalty of the bond; but it might well be held that recoveries could be had not exceeding the penalty in all. Commonwealth *v.* Wolbert, *supra.*"

In Comm. *v.* Reed (1866) 2 Bush (Ky.) 618, it was argued that the commonwealth for its own use had no cause of action on the official bond of a sheriff. Judge Robertson said: "Although there may have been no precedent of any judicial recognition of such a remedy, yet we can perceive no reason why it should not be available." And in an interesting opinion he holds that the commonwealth, "*as well as a citizen*," may sue on the bond and this "upon *common-law principles*," a local statute being characterized as "confirmatory, and, as we think, only declaratory of the common law."

"Whenever a new right occurs or is created by either contract or operation of law, if no peculiar remedy be appointed for it by statute, the usual remedy for the class of cases to which it belongs will be appropriate. * * * If, therefore, the bond be good at common law, the common-law remedy for enforcing it is not only proper, but is the only one which can be applied. * * * The general rule is that a bond, whether required by statute or not, is good at common law if entered into voluntarily and for a valid consideration and if not repugnant to the letter or policy of the law." (Robertson, J.)

Thompson *v.* Buchannon (1892) 2 J. J. Marsh (Ky.) 416.

A bond given to a judge of probate by one to whom the whole of the real estate of his ancestor has been assigned conditioned to pay to the other heirs their respective proportions of such estate is extra-official, but "undoubtedly good at common law." (Parker, J.)

Thomas *v.* White (1815) 12 Mass. 367, 370.

"It is admitted the bond (in suit) is not a statutory bond in replevin. On this appellants make their third point, which is that appellee, as sheriff, had no right to demand or receive this bond and no right to recover on it, even admitting that it was duly executed by the appellants. To

this it is answered the statutes of this State nowhere forbid taking such a bond, and if not expressly authorized by statute, it is nevertheless a good obligation at common law. The authorities cited by appellee sustain this position. Fournier *v.* Faggot, 3 Scam. 347; Pritchett *v.* The People, 1 Gilm. 525, where the general rule was said to be that any obligation entered into voluntarily and for a good consideration was valid at common law, when it does not contravene the policy of the law, and is not repugnant to some statutory provision. Other courts hold the same doctrine, and we have no occasion to disavow it." (Breese, J.)

Wolfe *v.* McClure (1875) 79 Ill. 564, 566, 567.

"Even if the bond be not a good statutory bond, a point which it is not now necessary to determine, it does not therefore follow that it is of no validity. It was entered into voluntarily and upon a sufficient consideration, and is, we think, a binding obligation at common law. * * * Numerous cases are reported in which it is held that bonds void as statutory bonds are, notwithstanding, binding at common law.

State *ex rel. v.* Lynch (1843) 6 Blackf. (Ind.) 395, 396.

"It is argued for the defendants that the bond is void because no law requires or authorizes a bond to be given *to selectmen* by a town treasurer or a collector of taxes; the Rev. Sts. *c.* 15, requiring such treasurer and collector to give bond *to the town*. On the other hand, it is insisted for the plaintiffs that the bond, though not made conformably to the statute, is valid by the common law." This position was held "sustained by authority" and so decided.

Sweetser *v.* Hay (1854) 2 Gray, 49, 51.

"It cannot be maintained that if a bond is executed without any undue advantage or any degree of oppression or extortion, by one undertaking to serve the public, that a mistake in the name of the obligee will avoid the instrument. If not valid as a statutory bond, it will be held good as a common-law security."

Gathwright *v.* Callaway County (1847) 10 Mo. 663, 666, 667.

"This was not an office bond according to the statute, because the penalty is ten thousand dollars, instead of twelve thousand dollars, as required by the statute, and because it was not approved and recorded as the statute directs. * * * A bond executed by a public officer and securities, though not good as a statutory bond, may nevertheless be binding as a voluntary obligation upon which an action at common law can be maintained."

Goodrum *v.* Foley (1841) 2 Humph. (Tenn.) 490, 492.

In Claasen *v.* Shaw (1836) 5 Watts (Pa.) 468, speaking of a bond taken by a constable conditioned for the satisfaction of an execution in his hands, it was said: "Being therefore void as a statutory obligation, the question is, Is it good at common law? And we are of opinion that it is."

To the same effect is Williams *v.* Coleman (1872) 49 Mo. 325, 326.

"Although the instrument may not conform to the special provision of the statute or regulations with which the parties executed it, nevertheless it is *a contract voluntarily entered into upon a sufficient consideration for a purpose not contrary to law.*"

Carnegie *v.* Hulbert (1895) 70 Fed. 209, 216.

So that whether the bond sued on is in the form prescribed by statute or not, it "is a contract voluntarily entered into upon a sufficient consideration for a purpose not contrary to law," and in the absence of a statue enlarging or restricting its operation, it is to be determined by a resort to the principles of the common law.

III.

Counsel for plaintiffs in error very frankly assert: "The statutes of the United States required bonds to be given by the clerks of the circuit courts *solely* for the protection of the United States, and *not at all for the protection of private parties.*" (Brief, p. 8.)

This proposition, to one acquainted with the procedure in Federal courts, is so startling and so fraught with dan-

ger and mischief that it carries with it its own refutation. Indeed, no authority is cited by plaintiffs in error directly in point, and to the credit of the clerks of the courts, it may be said but two cases are found in the reports where this precise question has arisen, the case at bar, United States *v.* Howard (1899) 93 Fed. 719, Rec., pp. 23-28; Howard *v.* United States (1900) 102 Fed. 77, Rec., pp. 31-40, and *In re* Finks (1889) 41 Fed. 383.

The case at bar was tried by Adams, J., on the circuit, and Caldwell, Sanborn and Thayer, JJ., sat in the Court of Appeals. All were unanimous, and in both courts opinions were filed. (See citation, *supra.*) The case was heard by Judge Adams February 18, 1889, and taken under advisement. (Rec., p. 10.) It was decided April 26, 1899. It was argued in the Court of Appeals, January 9, and decided April 9, 1900. (Rec., p. 30.) Nothing is presented to this Court that was not there urged with signal ability. The brief for plaintiffs in error is largely a reprint of that which was filed in the Circuit Court of Appeals.

In view of the demands made upon this Court and the increased area of its jurisdiction, the Court might well content itself with adopting the opinions heretofore rendered in this case. But in addition to the opinions in this case below, *In re* Finks (1889) 41 Fed. Rep. 383, is a direct authority in support of our right to recover. The sureties in that case contended "that no liability rests on them for the failure of the clerk to properly account for the money received by him in this case, because they say the court had no power to appoint the clerk receiver of a fund paid into the court; that the undertaking of the sureties extended only to the duties of the clerk, as clerk, and not those of a receiver." (41 Fed. 385.) This case is cited approvingly by the Circuit Court of Appeals in the opinion filed in the case at bar. (102 Fed. 84, Rec., p. 39.) It is true the point now urged, the sureties on the bond of a clerk of a court of the United States are not liable to an action at the relation of a private suitor, was not urged in the Finks case; but the very fact that neither the court nor the counsel in the Finks case thought of such a contention shows what the "common consent and opinion" of the legal profession has been,

which "of itself is a very pregnant circumstance, and very good evidence of what the law is."

Venable *v.* Wabash Western Ry. Co. (1893) 112 Mo. 103, 125.

As Judge Caldwell said: "For more than a century the clerks of the Circuit Courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner, and during that time neither the clerks nor the suitors nor the Court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys that they were receiving as such." The learned jurist, after citing the statute fixing the compensation of the clerk for receiving, keeping and paying out money, continued: "This poundage has always been allowed to them on moneys received and paid out by them. Nothing short of legislation can change the law as established by more than a hundred years of uniform and constant practice of the courts. The money sued for in this action was paid into court and received by the clerk in a 'cause pending in said court,' and it was the duty of the clerk to 'forthwith' deposit the same as required by Section 995. His failure to do so was a breach of the condition of his bond, for which the sureties are liable to the person suffering damage thereby." (102 Fed. 81, 82, Rec., pp. 36, 37.)

And Judge Adams said: "Considering all these things, it seems unreasonable to say that all Congress intended, by providing for a bond from clerks of the circuit court was to secure the United States itself against damage by official misconduct. On the contrary, the language of the act, construed in the light of the duties imposed upon the clerk and in the light of the obligations of the United States in the performance of its governmental functions connected therewith, conduce plainly to the result that such bond is intended for security for all suitors in this Court, and being so intended, an implied authority necessarily arises, permitting such suitor to put the bond in suit in the name of the United States to his use, for the redress of wrongs within the purview of the bond." (93 Fed. 721, Rec., p. 25.)

Let us recur to the condition of the instrument sued on. It is that the clerk "shall faithfully perform all the duties of the said office of clerk and seasonably record the decrees, judgments and determinations of said court." (Rec., p. 7.)

One of the most important of the duties of a clerk is to receive, keep and pay out money.

The statute (U. S. Stat. (1878) Sec. 795) requires a bond conditioned as the one sued on in the case at bar. (See United States *v.* Ambrose (1880) 2 Fed. Rep. 552, 553.) In the case just cited, an additional condition was inserted: "And shall properly account for all moneys that may come into his possession, as required by law." And "the defendants answered that the attorney-general required him (the clerk) to give the bond sued on containing a condition not required by statute, and that said bond, having been thus extorted under color of office, was void." (P. 552.) But, said Mr. Justice Swayne, speaking of this additional condition: "I am clear, upon reflection, under my view of the subject, that the entire liability covered by that language was covered by the more general terms which preceded, to-wit: 'that the clerk should faithfully discharge the duties of his office,' etc. Now one of the first and most important of the duties of the clerk undoubtedly is to pay over moneys that may come into his hands and which by law he was required to pay over." Of the additional conditions he observed: "They are no more comprehensive, they are no more onerous in any respect, as it seems to me, than if this specific requirement attached to it had not been contained in the bond at all." (P. 554.)

In Kitchen *v.* Woodfin (1877) Fed. Cas. No. 7855, 1 Hughes, 340, Judge Dick ruled that "when he (the clerk) receives money he incurs risk and responsibility. * * * The law imposes on a clerk the duty of receiving money collected on an execution when returned by the marshal. This legal requirement imposes *only an official duty* and does not constitute the clerk an agent of the plaintiff. * * * *The clerk is an agent of the law and not of the parties in suit*, unless made so by express agreement, or by acts from which such agency may be inferred."

It is conceded that under Section 784, Rev. Stat. of the United States, 1878, "in case of a breach of the condition of a marshal's bond, any person thereby injured" may sue in his own name and for his sole use on the bond. (Brief of Plaintiffs in Error, p. 22.)

But Mr. Justice Brown has ruled that "moneys received by the marshal should under these sections (995, 996) either be immediately deposited by him *or paid to the clerk* and by him deposited."

Fagan *v.* Cullen (1886) 28 Fed. Rep. 843, 844.

Would anyone for a moment believe that Mr. Justice Brown would decide that a bonded officer, a marshal, should pay money to the clerk, who, according to the contention of defendants, is, except as to the United States, an unbonded official?

In Blake *v.* Hawkins (1883) 19 Fed. 204, the defendants paid money to the clerk of a court, but denied his right to a commission of one per cent. In discussing this question, Judge Seymour said that it was safe for the defendants (not the United States, but private parties) to pay the clerk. "The judgment *and his official bond, one or both*, were their protection." (19 Fed. Rep. 205.) But what protection is an official bond on which no suit can be maintained?

Judge Dillon has ruled that the one per cent allowed by statute (Rev. Stat., Sec. 876) "is for compensation to the clerk for the trouble and *responsibility* of actually receiving, keeping and paying out money."

In re Goodrich (1878) 4 Dill. 230, Fed. Cas. No. 5541.

"The compensation of the clerks is for the trouble and *responsibility* of actually receiving, keeping and paying out money."

Smith *v.* The Morgan City (1889) 39 Fed. Rep. 572, 573 (Simonton, J.)

In The Avery (1814) Fed. Cas. 671, Mr. Justice Story said that the "known and uniform practice of the court, * * * a practice not only founded in the settled doctrines of the admiralty, but also of great importance for the *security of suitors*," required the marshal selling a vessel to do

as was done in that case: "The proceeds (were) paid over to the clerk of the district court." (2 Fed. Cas., p. 241.) What security has a suitor if he cannot sue on the bond of the clerk?

In Northwestern Mut. Life Ins. Co. *v.* Quinn, 69 Fed. Rep. (1895) 462, 464, Judge Lurton, speaking of certain money, said: "Certainly, the clerk was never responsible for any part of it, *and his bond had never protected it.*" That case arose on a question of the taxation of costs. The clerk claimed a commission on certain moneys, but because, among other things, "*his bond had never protected it*," the commission was disallowed, and yet in the case at bar it is gravely asserted that the bond of the clerk never does protect money in his hands.

The real plaintiff in this case, David D. Stewart, is himself a lawyer, and his assistance in the preparation of this brief is cheerfully acknowledged. We extract from his letters the following:

"Now in relation to this suit:

"1. It is fair, and perhaps necessary, to assume that Congress would intend to require a bond from the clerk of the United States courts that would protect all suitors who had money in those courts. The majority of congressmen are lawyers who would understand the necessity of such protection.

"2. The bond required by Rev. Stat. U. S., Sec. 795, provides that the clerk shall 'faithfully discharge the duties of his office and seasonably record the decrees, etc., of the court.'

"It is not easy to see what interest the United States can have in the condition of this bond except in suits to which they are a party. The decrees and judgments of the court in all other suits are in the sole interest of the parties to those suits. And while the United States are parties to one suit on the docket of the Circuit Court, there are probably fifty and perhaps a greater proportion of suits of ordinary litigants. It was the intention of this act of Congress to require such a bond as would protect the rights of these litigants as well as those of the United States. And it could all be readily done in one bond, the United States

acting as trustees for all ordinary litigants; and in their own right and for themselves where they had a pecuniary interest.

"3. It has often been held that the words 'faithfully discharge the duties of his office,' when applied to an officer in whose custody money is to be placed, make him responsible for such money.

Framington *v.* Stanley, 60 Me. 472.
Porter *v.* Stanley, 47 Me. 518.
United States *v.* Tingey, 5 Pet. 115.
Amherst Bank *v.* Root, 2 Metc. (Mass.) 538.
United States *v.* Hodge, 6 How. 279.
Gaussen *v.* United States, 97 U. S. 584.
United States *v.* Hodson, 10 Wall. 395, 407, 408.
Middlesex Mfg. Co. *v.* Lawrence, 1 Allen 339.
Bank of the United States *v.* Dandrage, 12 Wheat. 64.

"Congress evidently recognized this meaning of the words of the condition of the clerk's bond, and provided that 'for receiving, keeping and paying out money in pursuance of any statute or order of court, one per centum on the amount so received, kept and paid, shall be allowed.' (Rev. Stat. U. S., Secs. 828, 995 and 996.)

"When, therefore, the United States authorized the giving of such bond by the clerk as is specified in Sec. 795, it seems to me that they constituted themselves trustees for the benefit and protection of all suitors in their courts. And when the sureties executed the bond with the clerk, it seems to me that these sureties and the clerk consented and agreed to make the United States trustees for all suitors in court and for all persons having a legal interest in any moneys deposited in court with the clerk.

"And it necessarily follows, it seems to me, that an implied promise or covenant in the premises, and growing out of the relations between the respective parties, arises that suit might be brought in the name of the trustees for the benefit and protection of the *cestui que trust*, viz., the suitors in the court.

Sweetser *v.* Hay, 2 Gray, 49, 52.

"And it further seems to me that Secs. 783, 784, 785 and 786, instead of militating against this conclusion, support it. Without Sec. 784, the marshal's bond would have stood exactly like the clerk's with the same inferences and rights secured by it, with right of any person injured by the official acts of the marshal to institute a suit in the name of the obligees (the United States) as trustees, to recover his damages.

"By Sec. 784 an additional or cumulative remedy is given to all such parties by allowing a suit directly in the name of the party damaged.

"As no such provision as this is attached to Sec. 795, the remedy is confined to a suit in the name of the obligees in the clerk's bond.

"The conclusion, it seems to me, is unavoidable, that the act of Congress required the clerk to give the bond specified in Sec. 795, and that it was plainly intended to protect all suitors from the wrongful acts of the clerk, especially from the embezzlement of moneys entrusted to his keeping by suitors in court, and under the order or direction of the court.

"The bond is a contract. 'The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of its enforcement. This is the breath of its vital existence. * * * The ideas of right and remedy are inseparable.'

Edwards *v.* Kearzey, 96 U. S. 600.

"No other form of action being provided by Sec. 795 than is given by the common law upon all bonds, the inference is irresistible that Congress expected and intended that every *cestui que trust* under the bond—*i. e.*, every suitor injured by the clerk's not 'faithfully discharging the duties of his office,' would have ample remedy by suit upon the bond in the name of the obligees in that bond as trustees for his benefit and protection.

"The judge of the circuit court has no power or authority to require the clerk to give any other bond than that provided by Sec. 795.

United States *v.* Tingey, 5 Pet. 115.

"The inference follows irresistibly that Congress intended and regarded that bond as ample protection to all suitors in the United States courts; and that, in the absence of any special statute remedy (like Sec. 764) upon such bonds, the common-law remedy must be followed, viz., an action of debt upon the bond for the benefit of the injured party. Like a suit brought by the assignee of a chose in action in the name of the assignor who impliedly promises to stand as trustee and to do no act which will interfere with or affect the suit carried on in his name.

"4. The authorities already cited show that no judgment against the clerk alone is necessary before suit upon the bond.

"5. The provisions in the statutes of the different States, authorizing parties injured to bring suit upon the bond in the name of the State, appear to me to be cumulative or explanatory merely—really adding nothing to the rights of such parties, but making provisions that the State shall not be liable for the costs in such suits.

"It seems to me that when an act of the Legislature of a State or of Congress prescribes a bond or other form of security or obligation, to be given by any of its officers *for the protection of parties* whom the acts of such officer may injure, if no special form of remedy is given by the statute, the inference must follow that the remedy afforded by the common law is to be resorted to and that the Legislature regarded such remedy appropriate and ample, and intended it to be pursued.

Knowlton *v.* Ackley, 8 Cush. 97.

"Every form of contract or obligation known to the common law carries with it the common-law remedies.

"Statutes may furnish additional remedies which will be regarded as cumulative merely, unless the language of the statute is such as clearly makes such statute remedies exclusive.

Comm. *v.* Green, 12 Mass. 1.
Gooch *v.* Stephenson, 12 Me. 371.
State *v.* Boies, 41 Me. 346.

"It seems to me that the United States are but formal

or nominal parties, acting by force of their own legislation (Sec. 795) as trustees for suitors in their courts; that all the obligors in the bond conclusively assented to this arrangement by executing the bond, and covenanting to indemnify such suitors for any breach of the bond by the clerk. The suit at law must be brought in the name of the obligees, but the real parties are myself, a citizen of the State of Maine, and the clerk and sureties, citizens of the State of Missouri. I think the case is exactly like and is supported by Maryland *v.* Baldwin *et al.*, 112 U. S. 496.

"See, also,

Browne *v.* Strode, 5 Cranch, 363.
McNutt *v.* Bland, 2 How. 9.
Walden *v.* Skinner, 101 U. S. 589.
Huff *v.* Hutchinson *et al.*, 14 How. 586.

"I do not see how the United States have any interest in having the records made up, except in suits where they are the real parties."

Again he writes:

"The case cited from Wheaton (10 Wheat. 406) is undoubtedly sound law, and never questioned so far as I am aware. It is familiar law here. It is simply the old common law, that nobody can maintain a suit upon any chose in action non-negotiable, except a party to it. There was a bond given by one private party to another. The court simply decided that a third person could not maintain a suit upon it.

"It strikes me that our suit is wholly different. Here is an official bond, given under an act of Congress, or required by an act of Congress to be given by a clerk of the court created by Congress, with a condition that such clerk 'shall faithfully perform all the duties of the said office of clerk,' etc.

"What are those duties? The common law must be resorted to for most of them. A few are particularly specified by statute provisions. Among the duties of this clerk, he is bound to receive all moneys paid into the court by parties litigant, in the regular course of judicial proceedings, *and to keep them safely* for the parties eventually entitled to

them. And in several decisions of the Supreme Court they evidently recognize the clerk as responsible for the moneys paid into the court for parties litigant, and that such parties are as well secured when the money is in his hands as they would be if paid to the marshal or sheriff.

"This could only be upon the theory that they can hold the clerk's bondsmen, for he might personally be entirely worthless.

"It seems to me that the only real question in our case is whether the statute of the United States which prescribes the form of the clerk's bond, and makes it broad enough in terms to cover all his duties as clerk, does not *per se* authorize every person whose money comes into the hands of the clerk in the regular course of judicial proceedings, to maintain a suit on his bond to recover it; and whether it is not *per se* exactly equivalent in meaning and effect to the express provision authorizing a suit by a third person on the marshal's bond, though in case of the clerk authorizing the suit in the name of the obligee. The marshal is an executive officer. He has no duties to perform which are not executive in their nature. He seizes your property or mine wrongfully. He may be personally quite irresponsible. Neither of us, being third parties, could at common law maintain any suit on his bond for such unlawful seizure, for no statute provision authorizes him to make such seizure. He acted entirely in his own wrong. Of course, we could maintain trespass or trover against him personally at common law, but we could not maintain a suit on his bond, because its condition contains no provision authorizing him to perform the act of which we complain.

"Hence the necessity of a statute to enable us to sue on his bond for his unlawful acts.

"But the clerk is mainly a ministerial officer—perhaps partly in rare instances a judicial officer. Very few of his duties are defined by statute provisions. We are compelled to resort to the common law, which includes the practice of the courts, to know what his duties are.

"I recall no statute provision requiring him in terms to receive money in any case. I may have overlooked some statute. But a statute provision exists providing a commis-

sion for him upon moneys paid out by him to parties entitled to it. And this statute would be construed by the court, I presume, as an implied authority, probably an implied command, to receive and take care of it. And the commission is his compensation for such care.

"Money paid into court as a tender before suit; or upon some count under leave of court at common law; or as the terms upon which some amendment was granted; or upon sale of the property under a foreclosure or to satisfy some judgment recovered; or upon any proper order of the court in the course of judicial proceedings; or money brought into court upon a bill in equity to redeem a mortgage; or to execute a trust in some suit in court—all these (and others may readily occur) are cases where it becomes the duty of the clerk to receive and take care of the moneys so paid into court. The condition of his bond specifically requires him to faithfully perform all the duties of the office of clerk. This could only be for the benefit of the parties owing the moneys entrusted to his care. And if the statute under which this bond was given was intended by Congress to secure the faithful performance of the duties of the office of clerk, then, *per se*, it impliedly authorizes the injured party to maintain a suit in the name of the obligees (the United States) to recover the damages sustained. Otherwise, this particular condition of the bond is meaningless and a nullity, because it cannot be enforced in any other way. No suit can be maintained in the name of the party owning the money without express statute authority, because it would be contrary to the rule of the common law. But it was entirely competent for the obligees in such bond to act as trustees for the parties in interest.

"Like the assignor of a non-negotiable chose in action, an assignment of such chose carries with it at common law an implied authority to the assignee to treat the assignor as a trustee, and to bring suit in his name.

"So in this case it seems to me that this bond running to the United States, not only provides for the faithful performance of such duties as the United States needed (as the recording of judgments, decrees, etc.), but also provides that all duties owed by the clerk to third persons who are suit-

ors in the same court shall be equally 'faithfully performed,' and it carries with it an implied agreement on the part of the United States to stand as trustees for all such persons, and is, therefore, *per se*, an authority to such persons to institute suit in the name of such trustees. Unless this is so, all the conditions of the bond, except those relating to recording judgments and decrees of the court, become a sheer nullity. And until the Supreme Court of the United States decides otherwise, I should be strongly inclined to believe that the statute provisions and the conditions of the bond authorized by it constitute an implied agreement on the part of the United States, the obligees in the bond, to act as trustees for all persons injured by the default of the clerk in not accounting for moneys paid into court in the regular course of the judicial proceedings of said court; and an implied authority to all such persons to maintain a suit in the name of such obligees for the benefit of such persons.

"The bond ran to the United States as obligees. But what were its conditions? Evidently of a double character. The lawyers of Congress were familiar with the duties required of the clerk, among which were the keeping and safe custody of all moneys paid into court by parties litigant, and also to keep proper records of the judgments and decrees and orders of the court. The conditions of the bond were intentionally made broad—sufficiently so to protect parties in court, and to insure the recording of the doings of the court. In the latter branch the United States were interested as representing the general public. In the former, suitors in court only. As the bond could not be made running to each suitor as obligee, it was properly made running to the United States as obligees, but in trust for the benefit of all persons having an interest in the proceedings of the court. This was, therefore, equivalent to an implied promise on the part of the trustees to allow suits to be instituted in their name for the benefit of all persons who are covered and protected by its conditions. Unless this is a sound conclusion, then not a suitor in all the courts of the United States has the slightest protection from the embezzlements of irresponsible clerks.

"Of course, it is elementary law as held in 10 Wheat.

406, and everywhere else in the common-law world, that no person can maintain a suit in his own name on an official or private bond not running to himself as obligee, unless some statute authorizes it. But it is equally well settled that a *cestui que trust* can maintain a suit in the name of his trustee to enforce his rights, and that an implied promise on the part of the trustee allowing such suit is always inferred by law. Upon these principles I came to the conclusion that this suit was properly brought in the name of the United States as trustees, and that the statute providing the conditions of the bond carries an implied authority to bring such suit for every malfeasance of the clerk in the performance of his duties to suitors in the courts.

"The United States could not be expected *ex mero motu* to take notice of the countless instances all over the various States of the malfeasances and embezzlements of the various clerks, and unless the parties injured can maintain suits in the name of the obligees in the bond, as trustees, under this implied authority, the bond is valueless, and all parties in court unprotected.

"The suit now pending is a suit upon the bond of the clerk of the court for the embezzlement of money paid in to him in his official capacity of clerk by one party to a suit in court and entered of record so paid. The embezzlement is a breach of his bond. In the absence of a statute authorizing a suit by the injured party in his own name, a suit for such breach can be maintained only in the name of the obligees in the bond as trustees for the injured party, under the implied authority of the statute prescribing the conditions of the bond. This authority is just as good (it seems to me) as an express statute provision authorizing such suit, or authorizing a suit in the name of the injured party."

On November 14, 1898, he writes:

"St. Albans, Maine, 14 Nov., 1898.

"Hon. J. V. C. Karnes:

"Dear Sir,—Just at the time when I wrote you last I received notice from the clerk at Washington that two cases on writs of error, which I failed to reach at last term, would be reached in a short time, and I was obliged to leave home

immediately after writing you; and have unavoidably run much beyond the week mentioned in that letter.

"On my way I called to see the clerk of the circuit court in Boston, Mr. Stetson. He told me he had been clerk of district, circuit and appeals courts more than thirty years in all, and he understood (though he did not recall any specific case) *that any person suffering loss through misfeasance* or embezzlement of the clerk, could sustain a suit on his bond in the name of the United States as trustees. And he suggested that if the money deposited with the clerk as a tender or under any law or order of the court (as in a foreclosure suit) was deposited by the clerk in any depositary fixed by the court, the clerk would be released and the United States would be liable as trustees to parties entitled to the money and liable for its safe keeping; while if the clerk did not so deposit it, he would be liable on his bond to parties entitled to the money, and that the liability must be enforced in the name of the United States as obligees and trustees for the benefit of the parties so entitled—that in the first case the United States were trustees for the money, and in the other case were trustees in the bond for the party entitled to the money.

"I had not thought of his first suggestion, but it has always seemed to me that the second was sound law.

"The clerk's bond was certainly intended as security for the payment of all moneys deposited in the court in the due course of proceedings in court, and in the absence of a statute authorizing a party injured to bring suit in his own name on the bond, the statute implies an authority to maintain such suit in the name of the United States as irrevocable trustees for the injured party.

"I have examined many authorities during the summer and fall, and find none which militate against this view, but many which indirectly and directly sustain it. (Citing cases named in the opening of this brief.)

"Suppose there was no such statute provision as that in Burns' Stat., Sec. 253; but all official bonds throughout the State were required by statute to be in the name of the State, executors, administrators, collectors of taxes, clerks of courts, sheriffs, deputies, marshals, coroners, constables,

treasurers of cities, of towns, etc., etc. Do not all such bonds imply, by force of the statute, that the obligees, the people of Indiana (or the State of Indiana) give their consent to become trustees for the parties in interest, and the obligors in the bond give their consent to the State's becoming such trustee, and agree to make them trustees for all parties protected under the bond; out of all which *an* assent is implied by law to a suit by the trustees, and in the name of the trustees, for the benefit of any party injured; and the common law of the State affords the people form of suit or remedy? The statute is simply affirmative of the common law, which would stand exactly the same without it.

State to use of Mayor *v.* Norwood, 12 Md. 177, 194.
Maryland *v.* Baldwin, 112 U. S. 490.

"In Gelpecke *v.* Dubuque, 1 Wall. 220, 221, the power to subscribe for stock in a railroad and issue bonds in payment was held by the court to be implied, though not conferred directly.

"In Osborn *v.* United States Bank, 9 Wheat. 865, the court held that the power to do a general banking business was implied in its charter, because necessary to its performance of the governmental objects and purposes of the act of incorporation.

Osborn *v.* Bank, 9 Wheat. 860 *et seq.*

"In Corporation of Washington *v.* Young, 10 Wheat. 406, the suit was not upon an official bond given under some statute, but upon a bond at common law between obligees and obligors, of whom the plaintiff—in fact, McCue *et al.* were neither.

"Of course no principle is better settled at common law than the doctrine that one man cannot maintain a suit in the name of another without his consent. This is all that the court means to say, for they immediately add, 'and no person can be authorized to use the name of another without his assent given in fact or by legal intendment.' This last statement is inconsistent with the reporter's syllabus of the case, and implies that such consent may be given by legal intendment, which is exactly our case.

"I think it matter of grave doubt whether any Legislature could authorize a suit in your name or mine to be brought against our consent by a third person upon any common-law contract in which we had no interest, or in which we had an interest. The Chief Justice doubtless had in mind in part official bonds, upon which the Legislature could give authority to sue by express or direct words, or by legal intendment as well, for the benefit of any person intended by the Legislature to be protected by it. This case can be best understood by reading the next previous case, Brent *et al. v.* Davis, 10 Wheat. 396, and the special verdict of the jury. The two cases must be considered together and the reasoning of the Court must be understood to apply to the facts as they appear in both cases. And it is perfectly clear that the bond in suit in the second case was simply an obligation between private parties, and while McCue *et al.*, for whose use the second suit was brought, had an interest in having the lottery correctly drawn, they had no sort of legal interest in the condition of the bond. They were not named in it, and it was manifestly not made to protect them in any way or manner. It was wholly for the benefit of the obligees specifically named in the bond. Scores of other people, purchasers of the same lottery tickets, had the same interest in the same general subject-matter, yet not having taken any bonds for themselves specifically they would have no sort of legal interest in the condition of a bond taken by others similarly situated. Now the reasoning of the court must be applied to all these facts, and it is sound common law everywhere that upon such a bond a third person could maintain no suit, either in his own name or in the name of the obligees without their consent. This is the gist of the decision. The Chief Justice did not mean to say, and did not say, what the reporter's syllabus states. 'No person,' he says, 'who is not the proprietor (the obligees) of an obligation can have a legal right to put it in suit (in his own name, he means) unless such right be given by the Legislature'; which is unquestionably sound law as applied to contracts arising after such legislation was enacted, and perhaps to all contracts, as it simply gives a new remedy in favor of an assignee or other party actually interested

in the contract itself, while by the common law no suit could ever be maintained except in the name of the obligee.

"Then the Chief Justice adds, 'and no person can be authorized to use the name of another without his assent given in fact or by legal intendment.'

"This is exactly equivalent to saying that if he has such consent in fact or by legal intendment, he may maintain such suit in the name of another.

"Even at common law an assignee may always maintain a suit in the name of the assignor, but not in his own name without an act of the Legislature. An assignment of a chose in action always carries with it, by legal intendment, the consent of the assignor to a suit in his name to enforce it for the benefit of the assignee. And while anciently courts of law refused to notice such assignment, now assignments are everywhere protected by courts of law, and no act or even declaration by the assignor after the execution of the assignment is allowed to prejudice or affect the rights of the assignee.

"In this case of Washington Corporation *v.* Young, which we are considering, if the bond in suit has been assigned by the obligees (the corporation of Washington) to McCue *et al.*, the court would have held the action properly brought in the name of the corporation.

"The reporter's marginal note is not therefore supported by the opinion, but is calculated to mislead.

"The Chief Justice meant to say and did say in substance and effect, that upon a bond between private individuals, a suit in the name of the assignee or party in interest could not be maintained without an act of the Legislature—that the common law would not allow such suit, and that a third person could not bring suit upon such bond in the name of the original obligees, without their consent in fact or in law.

"No other construction or meaning can be legitimately given to this opinion. 'Can have a legal right to put it in suit' means to put it in suit in his own name; nor can he put it in suit in the name of the obligee without such obligee's consent in fact or law.

"Thus understood, it is an authority in our favor. It certainly was the intention of Congress in providing for and requiring a bond of the clerk, that such bond should be a protection to all suitors in the courts of the United States, and secure to them all moneys deposited with such clerk in the regular course of all proceedings in court.

"And the various decisions already referred to show that every court, State and national, so understand it. By legal intendment, therefore, and from the language of the condition, and from the purposes and objects intended by Congress to provide for, and to protect, the statute itself implies that a suit may always be brought by the party injured by the embezzlement of the clerk; and in the absence of an express provision allowing suit in his own name, by legal intendment the statute confers the right to bring suit in the name of the obligees, the United States, as trustees for the party injured, and implies the consent of such obligees to the bringing of such suit.

"In the language of the court in Babbitt's case, 95 U. S. 336, 'what is implied in a statute, will, deed or contract, is as much a part of it as what is expressed.'

"It would be an extraordinary anomaly for Congress to provide a bond for the protection of the suitors in its courts against the embezzlement of their moneys by the clerks of such courts, and at the same time give such suitors no remedy to recover such moneys. The remedy is the life of the contract (Edwards *v.* Kearzey, 96 U. S. 600). I do not for a moment believe that the Supreme Court of the United States would sustain such a doctrine. It would leave the parties—both parties—in every suit in the courts of the United States from Maine to California, without protection from the embezzlements of the clerks of such courts.

"The creditor in a judgment for a hundred dollars paid to the clerk of the court in which such judgment was secured and the bond-holders of a railroad corporation for whose benefit a million of dollars has been paid to the clerk under a foreclosure proceeding are alike without remedy.

"A statutory bond has the effect which in reason must have been intended by the statute.

Chladek *v.* Brown, 56 Ill. App. 379."

We call particular attention to the case of Stephenson *v.* Monmouth Min. and Mfg. Co. (1897) 86 Fed. Rep. 114, opinion by Lurton, circuit judge; Taft, circuit judge, and Clark, district judge, concurring. In the Stephenson case a statute of Michigan made it the duty of a city, when contracting for public improvements, to take a bond conditioned that all labor performed or materials furnished in the doing of the work be paid. The obligee in such bond was to be "the people of the State of Michigan." (84 Fed. 115.) A board of aldermen took a bond in which the obligee named was "the City of Menominee" instead of the statutory obligee. The principal contractor was Larson. The Monmouth Company furnished Larson a considerable amount of material which was not paid for, and thereupon the Monmouth Company sued the aldermen, Stephenson *et al.* The ground of the action was negligence in that the aldermen had not taken the bond required by the statute. On the circuit it was ruled that the bond actually executed by Larson to the "City of Menominee" did not give the Monmouth Company a cause of action. (84 Fed. Rep. 118.) But ruled Judge Lurton:

"Here, in our judgment, was the error of the learned judge. It is true that no action by the defendant in error as plaintiff would lie upon this bond; but that would also be the case if the bond had run to the people of the State of Michigan. The difference resulting from the mistake in drawing the bond so as to run to a promisee not authorized by the statute is that if the bond had run to the statutory obligee, the statute itself granted authority for the starting of a suit in the name of the people of the State of Michigan for the use and benefit of anyone intended as a beneficiary; while there is no statutory authority by which defendant in error might have used the name of the substituted obligee as plaintiff for its use and benefit. That no one can use the name of another as plaintiff without his consent given in fact or by legal intendment is clear. Washington *v.* Young, 10 Wheat. 404. But when a public municipality charged with the duty of taking and holding the bond required by this statute takes a bond properly conditioned, but running to itself, it does by legal intendment consent to the use of its corporate name as plaintiff by any

one beneficially interested in the bond thus taken, when indemnified against costs. No express authority of law is needed to authorize the use of the name of the city as plaintiff under such circumstances. The cases of Kiersted *v.* State, 1 Gill & J. 231, and Ing. *v.* State, 8 Md. 287, though differing in facts, are in point as to the principle."

Plaintiffs in error cite Murfree on Official Bonds, Section 504. (Brief, p. 8.) The head-note to that section is: "Action on official bond cannot be maintained *for collateral grievance* in favor of third persons." State *v.* Nichol is cited by Murfree as "8 Heisk. 657." The error is repeated by counsel for plaintiffs in error. (Brief, p. 9.) The correct citation is 8 Lea (76 Tenn.) 657. The fact that counsel in their brief repeat the error made by Murfree with respect to the citation of the case raises the presumption that counsel did not read the case before citing it. In the Tennessee case (State *v.* Nichol (1881) 8 Lea, 657), plaintiffs, merchants in Nashville, tendered the principal in the bond sued on, a clerk of a county court, certain currency in payment of a license which the law required them to obtain. The clerk wrongfully refused to accept this money. As Murfree says: "In this case it will be observed that the gravamen of the charge against the clerk was that he had *overdone* his duty * * *; where, however, the breach of the bond assigned is a neglect of the duty prescribed by law, *a very different question is presented.*" (Section 504.)

But in Section 430, Murfree says: "The chief distinction, therefore, between a statutory (official) bond, strictly so called, and a common-law bond is that the obligee or beneficiary of the former is entitled to all the special remedies and processes which are granted by statute law, whereas the common-law or voluntary bond stands upon the footing of an ordinary contract embodied in a bond upon condition between man and man."

And Section 468 discusses the question: "To whom officers and their sureties on their official bonds are liable," and states the answer to be: "In general a public officer is liable only to the person to whom the particular duty is owing"; and again in Section 486 he says: "The law in requiring an official bond contemplates it as security for those

whose rights it commits in certain cases to the officer." In Sec. 475, Murfree says: "It is almost unnecesary to say that whenever a breach of an official bond is committed by its principal obligor, a cause of action accrues to the obligee, either on his own behalf or for the use of such other persons as the instrument is intended to protect."

Murfree, Section 3: "At common law it (a bond) was not so far assignable that the assignee could sue upon it in his own name, nor, indeed, in the name of the obligee, unless authority to do so had been conferred in the assignment; and it has been said that its transfer in old times vested in the assignee only a power over the parchment or paper and the wax, to burn the one and melt the other. This rule, however, was so far relaxed that *suits in the name of the obligee for the use of his assignee became common before they were authorized by any statute.*"

Murfree, Section 64: "If a person holding such an official or trust position as might have caused him to be required to give an official bond to secure the due performance of his duty or trust, shall of his own accord and voluntarily enter into a bond with securities, conditioned for a due discharge of his duties or trusts, such a bond is not an official bond, because it was not required by the terms of any statute, or, if so required, was not exacted by any court having jurisdiction of the matter; but it is nevertheless a valid common-law bond, because it is founded on a sufficient consideration, is not prohibited by statute, nor contrary to public policy."

Murfree, Section 86: "A material distinction between an official bond, properly so called, and a common-law or voluntary bond, is that the remedies specially provided by statute for the enforcement of the former cannot be used for the latter."

Murfree, Section 323: "It is usually provided in statutes authorizing official bonds to be required of State, county or municipal officers, that suits may be brought upon them in the name of the official obligee 'upon the relation' or 'to the use' of the party injured by the breach of the bond or interested in its enforcement. *Whenever, however, this express provision is omitted by the statute itself, the deficiency is*

supplied by the construction given to such statute by the courts whenever a proper case for such a ruling is presented." (Citing with approval, State to use *v.* Norwood (1858) 12 Md. 177, 194.)

Murfree, Section 325: "The receipt of money by the clerk of a court of record, if it is in satisfaction of a judgment in his court, is an official act, even if such payment be made voluntarily, and, *a fortiori*, a payment made to such clerk by the sheriff, of money collected on execution, imposes an official obligation on the clerk and his sureties. They are liable on their bond for money received by their principal."

In view of the reliance placed upon the Tennessee case (State *v.* Nichol, *supra*) a citation of Governor *v.* Allen (1847) 8 Humph. (Tenn.) 176, is peculiarly apposite. It was there held bonds made payable to the governor of a State "which violate no public policy or private morality, but are appropriate to the execution of the laws, are valid and may be sued on in the name of the governor, for the benefit of those interested; though there be no statute expressly authorizing the execution of such bonds." This case is cited by Murfree, if not with approval, at least without dissent. (Section 438, note.)

It is stated by counsel for plaintiffs in error (Brief, p. 11) that the form of bond sued on "was originally prescribed by the Judiciary Act of September 24, 1789," and it is insisted "*at that time* the language thereof had a fixed and well-settled meaning." Two cases are cited, Crocker *v.* Fales, 13 Mass. 260, decided in 1816, and Auditor *v.* Dryden, 3 Leigh (Va.) 703, decided in 1832.

In Massachusetts, Judge Parker had said of an "extra-official" bond: "No objection is made to the validity of the bond. It is undoubtedly good at common law." Thomas *v.* White (1815) 12 Mass. *368, *370.

In the Virginia case, the conclusion was reached the official bond of a clerk was not required "with a view to secure accountability for the revenue collected, but secure the records from removal and destruction, *and to ensure the faithful discharge of ordinary official duties.*" (3 Leigh, 713.)

The Virginia case did not present the question in the case at bar. The auditor of public accounts invoked a statutory remedy—he made two motions for execution against the clerk and his surety. (3 Leigh, 704.)

No question of private interest or the right of an individual to sue on the bond was involved. The issue as stated by counsel, was the bond of the *clerk* "a security for the due collection of public taxes." President Tucker said: "By these acts it is ordained that every clerk shall enter into bond with condition for the due and faithful execution of his office and that he will not permit the records to be removed out of the county except in cases allowed by law. And it is contended that these words embrace every description of official duty; that they comprehend not only such official duties as then existed, but such as might from time to time be superadded, and that the collection and payment of taxes on law processes, etc., is as much an official duty as any other imposed upon the officer. These positions can not be denied as general propositions." The Court, however, after an investigation of the course of legislation, reached the conclusion that the bond of the clerk did not cover taxes collected, because as to taxes a separate bond had been required. (3 Leigh, 713.)

It is evident from Rev. Stat. United States, Sec. 3946, that a mail-contractor's bond is intended *solely* for the benefit of the Government, because the guarantors are to be certified as "pecuniarily responsible for and able to pay all damages the United States shall suffer by reason" of the breach of the contract; so that the Texas case cited by plaintiffs in error (Brief, p. 11) is not in point here.

The bond of a collector of internal revenue is "conditional that said collector shall faithfully perform the duties of his office according to law." (Rev. Stat. United States, 1878, Sec. 3143.) So that when the collector illegally seized property, he was a trespasser and not acting in an official capacity. So that the Georgia case (Brief of Plaintiffs in Error, pp. 11, 12) can be readily distinguished from the case at bar.

The Blumb case (1889) (99 Mo. 357) cited by plaintiffs in error (Brief, p. 13) has no application to the case at bar.

In the Blumb case, Judge Black said: "The bond must be construed as a whole." (99 Mo. 361.) The bond used this language: "*and shall indemnify the City of Kansas.*" (See Devers *v.* Howard (1898) 144 Mo. 671, 678.) The bond sued on in the case at bar is not limited in its terms to merely an indemnity for the United States. Its provisions are comprehensive, "shall faithfully perform *all the duties* of said office of clerk" (Rec., p. 7.)

The opinion of Chief Justice Marshall (McCue *v.* Young (1825) 10 Wheat. 406) has already been exhaustively considered by both of the lower courts in their opinions (Rec., pp. 24, 25, 40); by Judge Lurton in the Stephenson case (1897) 84 Fed. Rep. 114, 118, 119, and in this brief, *ante*, pp. 24, 30-33.

Counsel again cite Murfree, Section 504 (Brief, p. 15), wholly omitting any reference to Section 323, where it is said: "When, however, this express provision is omitted in the statute itself, the deficiency is supplied by the construction given to such statutes by the courts."

Plaintiffs in error are still in error when they say: "What if this rule of construction as an original proposition be wrong. It is now an established rule of construction, and every *statute enacted in the light of it ought to be read in said light.*" (Brief, p. 16.) We assume this refers to the contention made on page eleven of the brief of plaintiffs in error, a statute enacted in 1789, adopts a judicial construction announced in 1816.

Counsel for plaintiffs in error also ask: "If there should be both a public and private loss, if the penalty of the bond should be insufficient to cover both, which is to have priority? Or if they are to be prorated, on what basis is it to be done? The statute should regulate this matter." (Brief, p. 16.) This query is not at all pertinent in the case at bar. The clerk died in 1892. (Rec., p. 7.) So far as the record discloses, the Government has made no claim, nor has any private party. If counsel desire light on a question of interest to them, we commend to their perusal the discriminating opinion of Judge Putnam in American Surety Company *v.* Lawrenceville Cement Co. (1899) 96 Fed. Rep. 25. In that case, a surety on a bond was threatened with a

suit by the United States, and also by numerous individuals. No judgment had been rendered on the bond, but the aggregate of the amount claimed exceeded the penalty of the bond. The statute did not provide for a priority of the United States, and this was spoken of as a "serious defect." (96 Fed. 26.) The penalty, however, was prorated among the United States and the individuals affected thereby.

The further question is propounded: "Shall the vigilant have a priority? (Brief, p. 17.) This is answered by Murfree in the affirmative. (Section 485.) Should a clerk commit a breach of his bond, he may be removed so that "the future losses, private or public," so much dreaded by plaintiffs in error (Brief, p. 16), will not materialize. Again, it is contended "if the bond is to cover private injuries, some period of limitation ought to be prescribed therefor." (Brief, p. 17.) We assume in the absence of a special statute that the general law of the forum would obtain.

It is next claimed that Judge Adams differentiated a bond of a clerk of the circuit court from a bond of a clerk of the district court. Counsel say the circuit court's opinion is based upon a supposed or fancied difference between the bonds of circuit and district clerks. (Brief, p. 18.) No such distinction is found in the opinion of Judge Adams. All he said was that "the money involved in litigation in such (circuit) courts belongs almost exclusively to individual suitors, and rarely ever to the United States." (Rec., p. 24.) He then adds that suits by the United States are usually brought in the district court. He did not rule that an action might be maintained on the bond of a circuit clerk, and that none could be had on the bond of a district clerk.

Indeed, *In re* Finks (1889) 41 Fed. 383 involves the liability of the sureties of a clerk of a district court and in The Avery (1814) Fed. Cas. 671, Mr. Justice Story said the "security of suitors" required money realized in admiralty be paid to a clerk of *the district court*.

It is asserted that "United States marshals give bond as security for the benefit of individuals and for breach thereof any person injured may sue and recover in his own name; whereas for a clerk's bond there are no such provis-

ions." (Brief of Plaintiffs in Error, p. 22.) This has already been considered. (*Ante*, p. 19.)

In Lammon *v.* Feusier (1884) 111 U. S. 17, it was shown that there was a conflict in the decided cases where a marshal seized the property of one by virtue of an execution issued against another, some holding that such was an official act, for which his bond was liable, and some holding he was acting as a trespasser, and was only liable individually. To remedy this may have been the object of the statute giving a cause of action on the bond.

It is stated: "No limitation exists on a clerk's bond. This manifestly because no one but the Government has a right of action thereon." (Brief, p. 22.) But every cause of action resulting by legal intendment is, in the absence of a special statute of limitations, controlled by the general statute of the forum.

Counsel for plaintiffs in error say that "by Section 995 all money paid into court was required to be deposited in the depository." (Brief, p. 23.) This is a duty enjoined on the clerk. (Section 5504.) It is further stated: "These provisions suggest that the rights of the individual suitor were so carefully guarded that Congress saw no reason why a right of action on the bond should be given to individuals. If parties to causes did their duty in seeing that these provisions were complied with, or if the court did its duty, there could be no individual loss." (Brief, p. 23.) Let us assume for a moment a court to be in session. The judge is at his accustomed place and the clerk is ready to do his bidding. A defendant appears by counsel and states to the judge: "I owe plaintiff $2,525, and no more." The defendant desires to make a tender, not in accordance with a Missouri statute merely regulating costs, but in accordance with general principles of law. The Court orders it paid to the clerk. As Judge Adams said (Rec., 27): "It is common practice, when the Court is about to take money into judicial custody, to order it paid to the clerk. His duty then arises under Section 995, above quoted, to deposit it forthwith in the registry (or depository) of the court. If he fails to do so, he violates his duty, and this is exactly what Clerk Watson did." It was not the duty of the court to go with the

clerk and see that the money was actually deposited in the depository. The clerk's bond guaranteed that.

Again, counsel say that if Stewart had "been careful enough of his rights to see to it that these wise provisions of the law were complied with," no loss would have ensued. (Brief, p. 24.)

It is found as a fact (Rec., pp. 19, 20) and conceded by the parties (Rec., p. 14): "When the $2,525.00 was so paid to said Warren Watson, he *on the same day* deposited the same in a bank to his own credit. * * * David D. Stewart had no knowledge of said acts of Warren Watson."

So that in the case at bar, sureties, who stood bound for the faithful performance of the duties of a principal and who as to such duties stand in his shoes, seek to escape an admitted breach of duty because plaintiff, "who had no knowledge of said acts," did not take some steps to relieve them.

The following authorities are also in point:

The law of California required the deputy in the office of the county treasurer to give a bond to the *State*, but in this case the bond was made payable to the *treasurer*. Held, to be an official bond, and that any person interested might sue thereon.

Hubert *v.* Mendheim (1883) 64 Cal. 213.

In the case of McMechen *v.* Mayor, the Court was of the opinion that where a bond is given by an auctioneer to the mayor of a city conditioned for a faithful performance of his duties, a suit will lie thereon in the name of the obligee to the use of the injured party, and if the privilege was refused by the obligee, a court of chancery would compel it by injunction.

McMechen *v.* Mayor (1806) 2 Har. and J. (Md.) 41.

The same case appears in 3 Har. and J. 534 (1815), where the injured parties appear as equitable plaintiffs, and they were allowed to recover notwithstanding that neither the bond nor the ordinance under which it was given provided for suits by others than the obligee.

Suits against clerks may be brought in the name of the obligee for the use of the injured party.

Brown *v.* Lester (1850) 13 Smedes and M. (Miss.) 392.

The bond sued on in the case at bar was executed in Missouri. (Rec., p. 12.) The liability of one who makes a promise to another for the benefit of a third party is a question of local law.

Union Mutual Life Ins. Co. *v.* Hanford (1892) 143 U. S. 187, 190.

In the case of Devers *v.* Howard (1898) 144 Mo. 671, a city took a bond conditional that a contractor would pay for all material used in the construction of a public improvement. The bond was not given in pursuance of any statute, nor was there any statutory law governing its interpretation or giving any cause of action thereon to a third party. But the court upheld the right of a third party to sue on the bond.

It is also stated: "The original marshal's bond is filed with the clerk so that individual suitors who have an interest therein may have access thereto and have at hand the actual signatures of the sureties, if execution be denied, whereas the original bond of the clerk is filed with the Department of Justice. The only conceivable reason for the distinction is that the United States alone is interested in the clerk's bond." (Brief of Plaintiffs in Error, p. 22.) The reason for this distinction is that if the bond of the clerk was filed with the clerk, he would be the custodian of his own bond.

IV.

The contention that Watson did not receive the money by virtue of his office is conclusively answered by the opinions in the case at bar. (Rec., pp. 25-28, 37-39.)

It is claimed that "the statutes of Missouri on the subject of tender have no application in the Federal courts." (Brief, p. 24.)

Before considering the merits of this defence, a word as to its pertinency is in order.

The plaintiffs in error are the sureties of a clerk. They bind themselves that the clerk "shall faithfully perform all the duties of the said office of clerk." (Rec., p. 7.) A court is in session. A defendant, in the presence of the judge, pays $2,525 to a clerk. An order to that effect is made *of record* and signed by the judge. (Rec., p. 27.) The clerk embezzles the money. His sureties for a defence say the court of which their principal was an officer acted without warrant of law in receiving the money. Such a defence is untenable: the clerk and his sureties are estopped to deny the legality of the payment of money to him.

State *ex rel. v.* Ewing (1893) 116 Mo. 129, 135.

The sureties of the clerk attempt to support this defence by an extensive dissertation on what statutes of a State are followed by a Federal court. (Brief, pp. 24-28.) When did the clerk become the law officer of the court? The New Jersey case cited by plaintiffs in error (Brief, p. 40) expressly decides: "The clerk of the Circuit Court does not possess the least shred of judicial power." He cannot decide "what sum shall be paid, or what shall be received as money, or where the money shall be placed for safe keeping, or to whom it shall be paid."

And yet the sureties on the bond of a clerk gravely argue that the clerk had the right to decide for himself that a Missouri statute did not apply to a Federal court, and hence that "for safe keeping" he would convert the money to his own use.

All that was ruled in the case of Times Pub. Co. *v.* Carlisle (1899) 94 Fed Rep. 762, 771, was that "the Federal courts are not required to follow subordinate provisions of State statutes *which would encumber the administration of the law or tend to defeat the ends of justice in their tribunals.*"

It is said that Section 2939, Rev. Stat. of Missouri, 1889 (Brief of Plaintiffs in Error, p. 26), is merely a regulation of costs, but it is admitted: "It undoubtedly does authorize the depositing of the amount of the tender in any case *with the clerk*, and thus by implication makes it an official duty of the clerk to receive and care for the deposit"; but this is regarded *as a mere incident*. A litigant who has lost three

thousand dollars by reason *of a mere incident* may be pardoned if he differs with counsel as to the *incidental* feature of such a contention.

Again, counsel for plaintiffs in error claim: "It goes without saying that the State of Missouri cannot prescribe the duties or regulate the offices of the clerks of the courts of the United States." (Brief, p. 27.) Why not? Section 914 of the Revised Statutes of the United States conforms the practice in actions at law in the Federal courts, as near as may be, to those existing in like causes in the State courts. Assume that an attachment action was instituted in a Federal court in Missouri. The clerk fails to take the bond required by the Missouri statute. Would there be no liability on his bond?

But, independent of the Missouri statute, the principles of the common law permit a defendant to deposit for the use of a plaintiff, money admitted to be due. "*The rule is universal*" (Brief of Plaintiffs in Error, p. 36), but for some occult reason it is claimed this rule does not apply to Federal courts. (Brief, p. 48.)

We are frank to confess our inability to fully comprehend the contention of plaintiffs in error. A statute of Missouri permits a defendant to pay money to a clerk. (Brief, p. 26.) The Missouri courts hold a payment to a clerk to be a payment into court. In Mahan *v.* Waters (1875) 60 Mo. 167, 171, Judge Hough, speaking of a tender, said the defendant "must bring the money into court; that is, he must deposit it with the clerk."

In Crawford *v.* Armstrong (1894) 58 Mo. App. 214, money "deposited with the clerk of the circuit court" (217) was spoken of as "money paid *into court*," and "in the custody of the law." (Rombauer, P. J.)

We next learn that the statutes of a State in the Federal court "speak only when the other statutes of the United States are silent." (Brief, p. 28.) We next learn "there is no Federal statute directly bearing upon the subject." (Brief, p. 49.)

To recapitulate:

(*a*) A State statute applies in a Federal court only

when the Federal statute is silent. (Brief of Plaintiffs in Error, p. 28.)

(*b*) The Federal statute is silent. (Brief, p. 48.)

(*c*) The State statute *does not apply*. (Brief, p. 24.)

This is indeed reasoning in a circle.

V.

We are next confronted with the ever favorite defence of sureties: their principal did not act by virtue of his office. In this connection we cite the case of National Bank of Redemption *v.* Rutledge (1897) 84 Fed. 400, Hammond, J. The rule is thus stated: Any act which, if done genuinely and honestly by an officer would be an official act, is, if done dishonestly and fraudulently, an act done by virtue of his office. The discussion is quite exhaustive.

Will any one contend that if Watson had safely kept the money, he would not have claimed the statutory commission?

It is next argued that the money paid by Henry County was not paid into court, because the court had no control over the same. "The money remained the county's money, and could have been withdrawn by it, of its own motion, without the leave or license of any one." (Brief, p. 31, 32.) We had not fully appreciated the force of this until we read further, that if Henry County paid the money into court for the use of the plaintiff, "it immediately became the property of the plaintiff." (Brief, p. 36.) Certainly Henry County, in view of its answer in the Stewart case (Rec., p. 13), "*now brings said sum into court*," could not claim it was not properly paid into court. Hence it could not withdraw the money.

But under Section 995 it was the duty of the clerk to place it in the depository, and there it could not be touched without an order of the court.

So that if, as contended by the sureties, the money which Henry County "now brings into court" was never subject to the order of the court, it was because their principal committed a breach of his official bond.

The agreed statement of facts shows that "there was

entered *on the records of the court*," a recital that the defendant deposited with the clerk $2,525. (Rec., p. 13.)

As Judge Adams well said (Rec., p. 30): "It is common knowledge that the record-book is the mouthpiece of the court; it is under the direct control of the court, and no entry is made without the sanction of the court. *In fact, it appeared affirmatively at the hearing of this case that the record proceedings of March 3, 1891, showing a deposit of the money in question with the clerk*, was signed by the judge of the court." Counsel for plaintiffs in error deny this statement of fact in the opinion of the trial judge. (Brief, p. 33.) Desperate indeed must be the cause which requires at the hand of its champion an assertion that the trial judge was guilty of an untruth.

The judgment should be affirmed.

J. V. C. KARNES,
ALEXANDER NEW,
EDWIN A. KRAUTHOFF,
For David D. Stewart, Defendant in Error.

DAVID D. STEWART,
Of Counsel.

No. 121.

Howard et al. (Pltfs. in Error) v. Stewart

Supreme Court of the United States.

for U. S. (by Leave)

OCTOBER TERM, 1901.

No. 121.

Filed Feb. 8, 1902.

FREDERICK HOWARD ET AL.,
Plaintiffs in Error,

vs.

UNITED STATES, TO THE USE
OF DAVID D. STEWART,
Defendant in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

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ALEXANDER NEW,
EDWIN A. KRAUTHOFF,
For Defendant in Error.

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UNITED STATES, TO THE USE
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Defendant in Error.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

On January 20, 1902, this cause was argued orally, but unfortunately, Mr. Justice HARLAN and Mr. Justice GRAY were absent. Afterward on January 27, 1902, the cause was restored to the docket for re-submission to the full bench, with leave to counsel to file additional brief in ten days, if so desired.

The original briefs covered the ground of the action thoroughly and the oral argument by counsel was thought to be exhaustive of the subject, but further reflection has induced a be-

lief that perhaps counsel can be of some further service to the Court.

As to the question of jurisdiction, we desire to repeat that we are not apprehensive of the decision of the Court on the merits. We appreciate however that the question of jurisdiction is one that cannot be waived by counsel, but one that the Court is bound to notice for itself.

In addition to the cases cited in the original brief of defendant in error, we call the attention of the Court to State of Arkansas vs. Kansas & Texas Coal Company (December 2, 1901) 22 Sup. Ct. Rep. 47. In that case the State of Arkansas brought a suit in a state court to enjoin a defendant from bringing into the state certain laborers. The defendant, a foreign corporation, removed the case to the Federal Court where an injunction was denied and an appeal taken to the Supreme Court of the United States. It was admitted that a Federal Court could not take cognizance of the case on the ground of diverse citizenship because the State of Arkansas was not a citizen. It was contended that the suit was one arising under the laws of the United States, but, said the Court, speaking through Mr. Chief Justice FULLER: "In this case, the State asserted no right under the constitution or laws of the United States and put forward no ground of relief derived from either." In that case, the defendant asserted that under the inter-state commerce clause of the Constitution, the complainant had no right to interfere with the acts of the defendant, but, said the Court "assuming that the bill showed upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by Congress, or with the Fourteenth Amendment, as contended, it would only demonstrate that the bill could not be maintained at all, and not that the cause of action arose under the constitution or laws of the United States."

In the case at bar, the right of Stewart to maintain the action was sustained on common law principles, that is, the clerk having given a bond to the United States conditioned faithfully to discharge the duties of his office, such bond inured to the benefit of every person affected by a non-performance of such condition, and it was held the United States, *in taking such a bond*, by legal intendment consented to the use of its name, and gave the

right to sue on the bond to any one suffering damage by reason of a breach of the conditions of the bond.

The sureties on the bond defended on the ground that because there is no statute of the United States under which a cause of action can arise in favor of Stewart, there is no right to recover. As shown in the original brief, the Supreme Court of the United States has no jurisdiction to entertain the writ of error sued out in the pending action unless the cause of Stewart is one arising under the statutes of the United States. Having invoked the jurisdiction of this Court on the ground that the cause is one arising under the laws of the United States, the sureties are in no position to contend that under the laws of the United States no cause can ever arise in favor of Stewart. As Mr. Chief Justice FULLER said in the case above cited, such a contention only demonstrates that "the action could not be maintained at all, and not that the cause of action arose under the constitution or laws of the United States."

II.

Some confusion has been injected into the case as to the precise Acts of Congress which bear on the question before the Court.

By section 7, chap. 20 of the Act of Congress approved September 24, 1789 (1 U. S. Stat. at Large, p. 76) it was provided: "And the said clerks (of courts of the United States) shall also severally give bond, with sufficient sureties, (to be approved of by the Supreme and district courts respectively) to the United States, in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."

By section 2, chap. 93, of an Act of Congress approved March 3, 1863 (12 U. S. Stat. at Large, p. 768) it is provided: "The clerk of every court shall give bond in such sum as may be fixed by the court, and a new bond may be required whenever the court shall deem it proper that such bond shall be given."

By Volume One of the Revised Statutes of the United States, Section 795, it is provided: "The clerk of every court shall

give bond in a sum to be fixed, and with sureties to be approved by the court, which binds him faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."

Judge ADAMS, in the opinion rendered in this case in the circuit court, referred to section 795 (Rec. p. 23) and counsel for plaintiffs in error, in their brief, refer to "the form of bond required by Section 795" (Brief, page 11).

As appears from the preface to the Revised Statutes of the United States, it was provided that the same "shall not preclude reference to nor control in case of any discrepancy or effect of any original act as passed by Congress since the first day of September, 1873."

As Judge CALDWELL points out in his opinion (Rec., p. 35) "By the later act of February 22, 1875, 18 U. S. Stat. Chap. 95, Sec. 3, page 333," it is provided:

"That the clerks of the * * * circuit and district courts, respectively, shall each before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court for which he is appointed, to the United States, in the sum of not less than five and not more than twenty thousand dollars, to be determined and regulated by the Attorney General of the United States, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk."

It is now contended that because the act of February 22, 1875, names the United States as the obligee, the bond inures only to the benefit of the named obligee, and no one else can maintain an action thereon. As before stated, the act of March 3, 1863, did not give the name of any obligee, and so remained the law until February 22, 1875, nearly thirteen years, so that if the contention of counsel for plaintiffs in error is sound, that is, because the United States is named as the sole obligee in the bond, no cause of action arose on the bond in favor of any one else, it is evident that from March 3rd, 1863, to February 22nd, 1875, no cause of action could arise in favor of anyone, not even the United States, on the bond of the clerk of a court of the United States.

But, as shown by Judge CALDWELL in his opinion in the case at bar (Rec., p. 35): "Very curiously, section 795 of the

Revised Statutes (as did also the act of March 3rd, 1863), omitted to name any obligee in the bond. This omission, however, in no manner affected the validity of the bond, for, with or without a named obligee, the bond was a valid security to any one injured by a breach of its conditions."

At the oral argument of the case Mr. Justice WHITE asked the question, if a private suitor exhausted the penalty of the bond, what became of the rights of the Government? At first blush, it seems clear that on general principles, the United States should be entitled to a priority but, as we shall endeavor to show, no such rule of law prevails in this case. The United States as a government and each individual citizen as an integral unit in that system of government, stand on an equal footing so far as their rights are concerned.

It will be recalled that counsel for plaintiffs in error placed considerable stress upon Crocker v. Fales, 13 Mass., 262. This is spoken of as a *contemporaneous construction* of an Act of Congress approved in 1789, although the case was not decided until 1816, and it is claimed that by adopting the act of 1789, Congress also adopted the construction announced by the Supreme Court of Massachusetts in 1816, twenty-seven years later (Brief of Plaintiffs in Error, page 11.)

It is also stated "What if this rule of construction as an original proposition be wrong? It is now an established rule of construction, and every statute enacted in the light of it ought to be read in such light." (Brief of Plaintiffs in Error, page 16.)

As shown in the original brief of defendant in error (page 37) Crocker vs. Fales was decided in 1816, and hence Congress in passing the Act in 1789, could not have crystalized into law an interpretation given by the Supreme Court of Massachusetts twenty-seven years later.

Counsel for plaintiffs in error state: "It is therefore to be fairly assumed that Congress did not intend to give any greater effect to the language, but intended to use it in the sense *then understood by those learned in the law*. It is a rule of construction that where words have a well understood legal meaning, it is to be presumed that the legislature used them in that sense when subsequently adopting a statute." (Brief for Plaintiffs in Error, page 11.)

It is also stated that where there is an established rule of construction "every statute enacted in the light of it should be read in such light, because, if the legislative body wants the law to be otherwise than it would be when thus read, all it would have to do would be to say so in one or two words, and when it says nothing, it must be presumed to intend the consequences of its silence." (Brief for Plaintiffs in Error, page 16.)

As early as 1814, Mr. Justice STORY, who certainly is entitled to be classed as one of those "learned in the law," and also as being advised of the general rule of construction of statutes prevailing, especially in the State of Massachusetts, with whose jurisprudence he was particularly familiar, stated in The Avery, Fed. Cas. No. 671: "As to the claim *of the clerk* to one and a quarter per cent. commission, allowed him by the Act of February, 1799, c. 125, reviving the Act of 1st of March, 1793, c. 20, (1 Stat. 622) 'on all money deposited *in court*,' there is not, in my judgment, the slightest reason to contest it. The only argument urged against it is, that the money under the interlocutory sale ought not to have been paid *into court* by the marshal; and that *the clerk* cannot gain a title by an irregular act of the marshal. The whole foundation of this argument fails. It was not only not an irregularity for the marshal to pay the money into court, but it would have been a gross misconduct on his part to have done otherwise. It is his duty, on all interlocutory sales, to bring the proceeds immediately into court with a regular account of such sales. This is the known and uniform practice of the court, and I will add, it is a practice not only founded in the settled doctrines of the admiralty, *but also of great importance for the security of suitors.*"

So that as early as the year 1814, we have a distinct recognition by one so learned in the law as Mr. Justice STORY, that the *security of suitors* required a marshal, who, it is conceded, is a bonded officer, to pay the money to the clerk of the court. It can not be contended there was a distinction made between paying the money *into court* and paying the money *to the clerk* in the case of The Avery, for Mr. Justice STORY is particular to state that the property was sold "and the proceeds paid over to the *clerk of the district court.*"

In the opinion delivered in this case on the circuit, Judge

ADAMS said: "It is well known from the character of the jurisdiction conferred upon circuit courts, as well as from the practical administration and exercise of such jurisdiction, that the money involved in litigation in such courts, belongs almost exclusively to individual suitors and rarely ever to the United States" (Record, page 24).

It is stated by Judge CALDWELL: "For more than a century, the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner and during that time neither the clerks nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such. Under the provision of Section 828, the clerk is allowed for 'receiving, keeping and paying out money in pursuance of any Statute or the order of the Court one per centum on the amount so received and kept,' and this poundage has always been allowed to them on moneys received and paid out by them. *Nothing short of legislative action can change the law as established by more than a hundred years of uniform and constant practice of the courts.*"

The case of State to use of Mayor vs. Norwood, 12 Md., 177, was decided in 1858. In that case it was contended by counsel for defendants "The Mayor and City Council of Baltimore had no right to use the name of the State in entering a suit upon this bond without authority from the State." 12 Md., 178. The Court said: "The laws which provide for the execution similar to the one before us do not require them for the purpose of protecting the rights of the State alone. They are also designed to secure the faithful performance of official duties in the discharge of which individuals and corporations have a deep interest, and, therefore, they should have the privilege of suing such bonds for injuries sustained by them through the negligence or mal-conduct of officers." 12 Md., 194.

In the original brief of defendant in error, pages 18-20, cases decided by Mr. Justice BROWN, Judge DILLON, Judge SIMONTON, Judge LURTON, Judge SEYMOUR, and Judge DICK were cited, all showing a common understanding that the clerk in receiving money incurs responsibility, and the money paid to a

clerk is covered by his official bond. It is now claimed that the clerk incurs no responsibility save merely a personal obligation, and that his official bond did not protect the money.

From all these cases it is clear that Congress intended by the Act requiring the bond to be given that such bond should stand as security for private suitors affected by the breach of the conditions of the bond and that by legal intendment the right was given to sue on the bond.

When this statement was made at the oral argument, Mr. Justice WHITE interrupted counsel with the statement that such a contention clearly invoked the jurisdiction of the court on the ground that the cause arose under the laws of the United States. This is not so. The contention of Stewart is that without any Act of Congress requiring the bond to be given, and on principles of general jurisprudence as distinguished from congressional legislation, if the clerk of a court of the United States voluntarily gave a bond conditioned and in the form as the one sued on in the case at bar, a private suitor would have a cause of action, and this too without any express statute requiring the bond to be given, or giving a cause of action. A circuit court of the United States would have jurisdiction of such an action in a case involving over two thousand dollars, and instituted by a non-resident of the State in which the suit was brought.

The contention of the plaintiffs in error is that, as Congress required the bond to be given "to the United States," but did not give a cause of action to a private suitor, Congress negatived the general principles of jurisprudence contended for by us, and the cause of action which otherwise would exist did not in fact exist.

We are not sure that we have made ourselves entirely clear, but what Stewart contends for is this:

(a.) If the clerk of a circuit court of the United States voluntarily gave a bond conditioned for the faithful performance of his duties, the validity of such bond is not affected by the absence of a statute requiring it to be given. The cases cited in our original brief show that it needs no statute to enable an officer to give a bond conditioned for the faithful discharge of his duties. Of course if there was a statute enlarging or varying the effect of

the bond, or giving a special remedy on the bond not otherwise existent, such statute would be enforced by the court.

(*b.*) Such a bond voluntarily given, either with or without a named obligee, becomes in effect a common law obligation, on which any person who is directly interested in the faithful discharge of the duties of the office has a right to maintain an action.

(*c.*) Jurisdiction of such a case can be entertained by a circuit court of the United States in any case involving the requisite amount and diversity of citizenship.

In this aspect of the case, our right to recover can not be said to present a case arising under the laws of the United States. On the contrary, it is the defendant sureties who invoke the laws of the United States and who contend that because the statute names a given obligee, the bond inures only to the benefit of the obligee. As said by Mr. Chief Justice FULLER in the State of Arkansas vs. Kansas & Texas Coal Company, *supra*, such a contention "would only demonstrate that the action could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States."

III.

At the oral argument of the case, counsel for defendant in error, in response to an inquiry of Mr. Justice WHITE as to the priority of the Government, referred to the rights of the United States "by reason of its sovereignty." In this statement counsel inadvertently confused the rights of sovereignty of the crown of England and the rights of sovereignty of the people of the United States. In the United States it is the people who are the sovereign, and the Government, as a nation, has only those rights which the people, either by the Constitution, or by legislative enactment, have conferred upon the Government, so that it is improper to say that "by reason of its sovereignty" the United States is entitled to priority in any case. It is only by reason of positive law that such priority exists in any case. As stated by Mr. Justice STORY, speaking for the court: "The right of priority of payment of debts due to the Government is a prerogative of the crown well known to the common law. * * * The claim of the United States, however, does not stand upon

any *sovereign prerogative*, but is exclusively founded upon the actual provisions of their own statutes."

United States vs. State Bank of North Carolina, 6 Peters, 29, 35.

That the priority of the United States as a creditor depends upon the provisions of a statute enacted by Congress, and does not arise from any claim of sovereignty, is conclusively established by the decision of this court in Cook County National Bank vs. United States, 107 U. S., 445, in which it was held that the United States had no priority of payment of debts due to it in the administration of the affairs of an insolvent National Bank. It is not expressly stated in that case that a statute was necessary, but the reasoning of the court shows there was no statute giving such a priority, and, hence, the priority was not allowed.

In Murfree on Official Bonds, Section 279, it is stated: "Closely connected with the subject of official bonds given to the United States, or for its benefit, is the priority of payment to which the government is entitled *under the several Acts of Congress.*" In the section cited *et seq.* the various decisions of the Supreme Court of the United States, construing statutes providing for the priority of payment are considered, and such statutes are held to apply only in certain cases arising from the insolvency of the debtor.

The penalty of the bond sued on in the case at bar is twenty thousand dollars; this is the maximum amount required by the Act of February 22, 1875. The record in the case discloses that the defalcation complained of occurred March 3, 1891, more than ten years ago. (Record, page 34.) It further states that the clerk who committed the wrongful act died March 24, 1892; that said clerk was a resident of Jackson County, Missouri, and his estate was administered by the Probate Court of said county, and a final settlement was made September 11, 1894. It is further stated that on April 5, 1892, the administrator of the estate of the deceased "gave the notices required by the statutes of Missouri for the presentation of claims" against the estate of the clerk. The record further shows: "At no time did the United States * * * ever exhibit or present any demand or claim against said estate in said probate proceedings, or as provided by

the laws of Missouri for exhibiting or presenting claims against the estates of decedents." (Record, page 32.)

From this it is evident that on the bond in suit the United States has no cause of action because it has suffered no damage by reason of any of the acts of the clerk, so that, as stated by Mr. Justice WHITE on the oral argument, the question as to the priority of the United States on the bond in suit is more theoretical than practical. The only way in which the question of priority is injected in the case at all is on the theory that all of the penalty of the bond is required for the protection of the government, and, hence, under no circumstances can a private suitor have a cause of action; in other words, the sureties do not admit that this is a bond given for the benefit of the government and also for the benefit of a private suitor, in which the penalty is insufficient to cover the loss sustained by the United States and also by the private suitor, and ask the protection of the Court so that the priority of the United States may be secured, but the sureties contend that by reason of a possible claim of priority, no cause of action should be maintained in favor of a private suitor. But, as contended for by Stewart, the bond stands as security for both the government and the private suitor.

So that, whether the United States is entitled to priority in the event of it having suffered damage at the hands of the clerk, does not arise in this case. There is no middle ground. Either the bond inures to the benefit of Stewart, or it does not; if it inures solely to the benefit of the government, the question of the priority of course does not arise, but if, as shown by all of the authorities on the subject, the bond stands as security both for the government and for the individual, then no question of priority arises in this case, because there is no showing that the United States has suffered any damage nor sustained any loss, nor that the United States has a cause of action on the bond.

After all, the government of the United States is but an aggregation of individuals. The constitution which created and preserved the national union has for its preamble "the people of the United States." In the absence of an express enactment of Congress to that effect, the rights of the aggregate of the people of the United States are no more sacred than the individual right of any one of those people. As Bishop HOOKER said: "Of law,

it cannot be less than acknowledged than that her seat is the bosom of God, her voice the harmony of the universe, *the very least as feeling her care*, the greatest as not exempt from her power." And was it not our Great Master who said: "Inasmuch as you have done it unto the least of these, my brethren, you have done it unto me."

So that when this court, by its judgment of affirmance herein, preserves sacred and inviolable, the temples of justice in which are administered the laws governing us in our private and public relations, the rights of the United States as a government of the people of the United States are sacredly preserved. Such a result, announcing to the world, that money deposited with the clerk of a court of the United States, in the presence and with the sanction of the court, is a sacred trust, one to be preserved by the government and effectuated to the owner, is of infinitely more value than a declaration that in the distribution of the penalty of an official bond the government is entitled to priority and such priority held to exclude the right of an individual, an integral unit in that system of government.

J. V. C. KARNES,
ALEXANDER NEW,
EDWIN A. KRAUTHOFF,
For Defendant in Error.

DAVID D. STEWART,
Of Counsel.

Supreme Court of the United States.

No. 121.—October Term, 1901.

Frederick C. Howard, James L. Lombard and John C. Gage, Plaintiffs in Error, *vs.* The United States to the use of David D. Stewart.	In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 24th 1902.]

Mr. Justice Harlan delivered the opinion of the Court.

Were the appellants entitled, of right, to bring this case here from the Circuit Court of Appeals? Has a clerk of a Circuit Court of the United States authority to receive money brought into court by a private suitor, and is he responsible upon his bond if he does not deposit it as required by statute and appropriates it to his own use? Is the bond of the clerk for the protection of private suitors as well as of the United States? Has a private suitor the right without express statutory authority to sue on the bond of the clerk in the name of the United States for his benefit?

These questions are presented by the record, and will be examined after we shall have stated the facts set out in the special findings made by the Circuit Court.

On the 3d day of March 1887 Warren Watson was duly appointed clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri; and on the same day he executed and the court approved his bond to the United States in the penalty of twenty thousand dollars.

He died March 24th 1892 while acting as clerk, and an administrator of his estate was appointed April 2d 1892. Notices, as required by the local law, having been previously given for the presentation of claims, the administration of the estate was closed and the administrator discharged on the 11th day of September 1894. At no time did the United States or the relator Stewart exhibit or present any claim against Watson's estate.

Stewart instituted, February 6th 1891, in the Circuit Court of the United States a suit at law against Henry County, Missouri, upon three bonds of the county, two for $1,000 each and one for $500. His petition contained three counts. In the first count he asked for judgment for $1,010 with interest from September 1st 1887 as the amount due on the first bond of $1,000. The second count was upon the other bond for $1,000; the third, upon the $500 bond.

On the 3d day of March 1891 the county filed its answer alleging as to the first count that on September 6th [1st] 1887 there was due on the bond therein referred to $1,010, and on that date it had deposited that sum in the National Bank of Commerce of New York for the payment of the bond and interest, and tendered the same to the plaintiff as full payment thereof, but that the plaintiff had refused to accept such payment. The answer further alleged that the defendant had "at all times been ready and willing to pay plaintiff said sum of $1,010 in full payment of said bond and unpaid interest, and now here again tenders to plaintiff said sum of $1,010 in full payment of said bond and unpaid interest due thereon, on September 6th [1st] 1887, and *now brings the said sum into court.*" The answer to the second and third counts was exactly the same, except that as to the third count the amount named was $505 instead of $1,010.

On the same day, March 3d 1891, there was entered on the records of the court in said cause the following order: "This day comes defendant by its attorney and files answer and tenders to the plaintiff and *deposits with the clerk* the sum of $2,525 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein."

It was found as a fact that Henry County did hand to Watson the sum of $2,525 as recited in that order.

On June 27th 1891 Stewart, the plaintiff in that suit, filed a reply, which was a general denial of the facts alleged in the answer.

On July 2d 1894, more than two years after Watson's death, there was entered on the records of the court in the cause the following: "This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court and by the court taken under advisement with leave to the parties to file briefs."

On the 11th day of February 1895 the following order was made in that case: "A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to wit: On the first count of the petition the court finds that the principal and interest on bond No. 204 was duly tendered by defendant at the place of payment on the first day of September 1887, and that after the plaintiff instituted this action in this court, and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff, and that plaintiff is entitled to judgment therefor on the

first count of the petition in the sum of $1,010." The findings on the other counts differed only as to amounts.

The order in the same case then proceeded: "It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars ($2,525), the aggregate amount found to be owing to him under the three counts of the petition, and that plaintiff pay the costs of this action and that execution issue therefor. And it further appearing to the court that the said sum of $2,525, so paid into court as aforesaid, was paid to and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk, or otherwise: It is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid."

No appeal was taken from this judgment, and the same became final and remained in full force and effect and unpaid.

No order or direction as to this money was ever made except as indicated in the order of February 11th 1895.

When the $2,525 was paid by Henry County to Watson, he deposited it the same day in a bank *to his individual credit*, and it was not at any time treated by him as in the depository of the court. He never presented to the court any account of the money, nor paid it either to Henry County or to Stewart. During the pendency of the Stewart suit against the county neither party took any steps for an order in relation to the money, other than was actually made as above stated, nor made any objection to the method in which the money was received. Stewart, however, had no knowledge of the acts of Watson.

It was further found that no demand was ever made on the defendants or on Watson for the money other than is to be inferred from the institution of the suit.

The present action was brought October 19th 1895 against the sureties in Watson's bond, in the name of the United States, at the relation and to the use of David D. Stewart. One of the sureties, McDonald, pleaded his discharge in bankruptcy, and that plea was sustained. Judgment was entered against the sureties (except McDonald) for the sum of $2,525 with interest at six per cent from the commencement of this suit, making total of $3,057.77. 93 *Fed. Rep.* 719. That judgment was affirmed in the Circuit Court of Appeals. 102 *Fed. Rep.* 77.

1. The first question is one of the jurisdiction of this court. The defendant in error insists that the judgment of the Circuit Court of Appeals was final, and that therefore no writ of error lay to this court.

Is this a correct interpretation of the statutes defining and regulating the jurisdiction of the courts of the United States?

In all cases in which the judgments of a Circuit Court of Appeals are not made final by the act of March 3d 1891, *c.* 517, there is of right an appeal or writ of error to this court where the matter in controversy exceeds one thousand dollars in value besides costs. 26 *Stat.* 826, 828.

Among the cases in which the judgments or decrees of the Circuit Courts of Appeals are made final are those in which the jurisdiction of the Circuit Court "is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." 26 *Stat.* 828.

The opposite parties here are Stewart, the relator, a citizen of Maine, for whose benefit the suit was brought, and the sureties on the bond of Watson, who are all citizens of Missouri. The Government is the nominal, while Stewart is the real, plaintiff. His citizenship is to be regarded in any inquiry as to jurisdiction. *Browne* v. *Strode*, 5 *Cranch*, 303; *McNutt* v. *Bland*, 2 *How.* 9; *Maryland* v. *Baldwin*, 112 *U. S.* 490.

But does it not appear from the petition itself that the case was one of which the Circuit Court could take cognizance independently of the citizenship of the real parties in interest? This question must receive an affirmative answer. The suit was directly upon a bond taken by the Circuit Court in conformity with the statutes of the United States, and the case depends upon the scope and effect of that bond and the meaning of those statutes. It was therefore a suit arising under the laws of the United States, of which the Circuit Court (concurrently with the courts of the State) was entitled to take original cognizance, even if the parties had been citizens of the same State. 25 *Stat.* 434, *c.* 866. This court has heretofore decided that a suit upon a bond of a marshal of the United States was one arising under the laws of the United States. *Feibelman* v. *Packard*, 109 *U. S.* 421, 423; *Buchrack* v. *Norton*, 132 *U. S.* 337; *Reagan* v. *Aiken*, 138 *U. S.* 109; *Bock* v. *Perkins*, 139 *U. S.* 628, 630. The same principle must be held to be applicable to suits upon the bond of a clerk of a court of the United States. It could not be that a suit upon the bond of a marshal was one arising under the laws of the United States, and that a suit upon the bond of a clerk of a court of the United States was not of that class.

It results that although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon Federal grounds. And as the case was one which could not have been brought here directly from the

Circuit Court, the final judgment of the Circuit Court of Appeals could be reviewed in this court upon writ of error sued out by the defendants.

2. We now come to the merits of the case. The bond in suit was taken under the authority of section 795 of the Revised Statutes as amended by the act of February 22d 1875, *c.* 95, 18 *Stat.* 333. That section reads: "§ 795. *The clerk of every court shall give bond, in a sum to be fixed* and with sureties to be approved by the court which appoints him, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk; and a new bond may be required whenever the court deems it proper that such bond should be given. A copy of every bond given by a clerk shall be entered on the journal of the court for which he is appointed, and the bond shall be deposited for safekeeping as the court may direct. A certified copy of such entry shall be *prima facie* proof of the execution of such bond and of the contents thereof."

The conditions of the bond, as set forth in this section, were the same as those prescribed by the Judiciary Act of 1789. 1 *Stat.* 76.

It will be observed that section 795 does not name the obligee in the bond, and leaves its amount to be fixed by the court. But the third section of the act of 1875 provided, as did the Judiciary Act of 1789, that the clerks should give bond to the United States. The act of 1875 also required bond "in the sum of not less than five nor more than twenty thousand dollars, to be determined and regulated by the Attorney General of the United States." And the same act authorized the Attorney General to require a bond in a sum not to exceed forty thousand dollars whenever the business of the courts should make it necessary.

It must be taken as indisputable that the money in question was paid by Henry County in satisfaction of Stewart's claim or cause of action. It must also be taken as indisputable, upon this record, that the deposit was made with Watson as clerk in the presence and with the assent of the court, although no order was entered expressly requiring the money to be paid to the clerk or expressly directing him to receive it. But all this is necessarily to be implied from the terms of the order of March 3d 1891, which states that Henry County—presumably in the presence of the court—*deposited the money with the clerk.* It would be a very narrow interpretation of the words of that order to hold that the money was paid to Watson without the knowledge, approval or sanction of the court, or that it was paid to him as an individual and not in his capacity as clerk. The order was equivalent to one expressly stating that the money was paid by direction of the court to Watson as clerk.

But it is suggested that in the absence of a statute distinctly so providing, the clerk was not entitled to receive the money deposited in payment and satisfaction of Stewart's claim. It is true that no statute declares in words

that a clerk may receive money brought into court for the purposes of a pending suit. But it is clear that Henry County was entitled to bring into court and tender to its adversary the amount it was willing to pay in satisfaction of his claim. It cannot be that it was the duty of the judge of the court himself to have received the money and personally deposited it as required by law. No one has ever supposed that a judge was under obligation to perform such services. Who, then, was to receive the money? Plainly it was the duty of the clerk, who was the arm of the court, kept its records showing money paid in by suitors or officers, and was under bond conditioned that he would faithfully perform all the duties of his office. He was allowed by statute a commission "for *receiving*, keeping and paying out money in pursuance of any statute or order of court." *Rev. Stat.* § 828. It was well said by Judge Caldwell, delivering the unanimous judgment of the Circuit Court of Appeals, that "for more than a century the clerks of the Circuit Courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and ordinary manner, and during that time neither the clerks nor the suitors nor the court ever dreamed that they were performing this service as private individuals, and were not officially responsible for the moneys they were receiving as such clerks."

That the clerk was authorized, with the sanction or by order of court, to receive money paid into court in a pending cause, is clearly to be implied from the legislation of Congress. It will be well to trace the history of this question through the statutes enacted from time to time.

By the act of March 1st 1793, c. 20, clerks of District Courts were allowed one and a quarter per cent commission on "all money deposited in court." 1 *Stat.* 332–3; *Ib.* 625, c. 19, § 3. Money received by a marshal in a prize cause was held by Mr. Justice Story to be properly paid over to the *clerk*, and that he was entitled to commissions under the statute. That practice, he held, was of great importance for the "security of suitors." *The Avery* (1814), 2 *Gall.* 308, 311. See also *Blake* v. *Hawkins*, 19 *Fed. Rep.* 204; *In re Goodrich*, 4 *Dill.* 230; *Smith* v. *Morgan City*, 39 *Fed. Rep.* 572. In *Fagan* v. *Cullen*, 28 *Fed. Rep.* 843, 844, Mr. Justice Brown held that moneys received by the marshal should, under sections 995 and 996 of the Revised Statutes, either be immediately deposited by him "*or paid to the clerk* and by him deposited."

By an act approved April 18th 1814, c. 62, it was provided that upon the payment of money into a District or Circuit Court to abide the order of the court, the same should be deposited in an incorporated bank to be designated by the court, there to remain until it was decided to whom it of right belonged. If there was no such bank, then the court could "direct" the money to be deposited according to its discretion. 3 *Stat.* 127. Could not such direction have been given to the clerk?

The act of 1814 was supplemented by one approved March 3d 1817, c. 108, making it the duty of Circuit and District Courts "to cause and direct" all moneys remaining in such courts, and all moneys subject to their order, to be deposited in a branch of the Bank of the United States in the name and to the credit of the court. § 1. The same direction was given by the act as to all moneys thereafter paid into said courts, "or received by the officers thereof." § 2. All payments out of such moneys were to be entered of record by the clerk. § 3. It was further provided that if any "clerk of such court," or other officer thereof, "receiving any such moneys," should refuse or neglect to obey the order of the court for depositing the same, such clerk or other officer was liable to be forthwith proceeded against by attachment for contempt. § 4. The same act imposed upon the clerk the duty of presenting an account at each session of court of all moneys remaining therein. § 5. 3 *Stat.* 395.

The acts of 1814 and 1817 were technically repealed by the act of March 24th 1871, entitled "An act relating to moneys paid into the courts of the United States." 17 *Stat.* 1, c. 2. But the act of 1871 retained substantially all the provisions of the two former acts and added others. That act provided, among other things, that all moneys in the registry of any court of the United States, or "in the hands or under the control of an officer of such court, which were received in any cause pending or adjudicated in such court," should within thirty days after the passage of the act be deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court; that all such moneys which were thereafter paid into such courts, "or received by the officers thereof," should be forthwith deposited in like manner; that if any *clerk* or other officer of a court of the United States deposited any money belonging in the registry of the court in violation of that act, or should retain or convert it to his own use, or to the use of any other person, he should be deemed guilty of embezzlement, and on conviction be punished by a fine of not less than five hundred dollars and not more than the amount embezzled, or by imprisonment for a term of not less than one year nor more than ten years, or both, at the discretion of the court; and that if any person should knowingly receive from a *clerk* or other officer of a court of the United States any money belonging in the registry of the court as a deposit, loan or otherwise, in violation of the act, he should be deemed guilty of embezzlement, and be punished as therein provided.

These provisions of the act of 1871 have been substantially reproduced in the following sections of Revised Statutes:

"§ 798. At each regular session of any court of the United States the *clerk* shall present to the court an account of all moneys remaining therein, or subject to its order, stating in detail in what causes they are deposited,

and in what causes payments have been made; and said account and the vouchers thereof shall be filed in the court."

"§ 995. All moneys paid into any court of the United States, *or received by the officers thereof, in any cause pending or adjudicated in such court*, shall be forthwith deposited with the Treasurer, an assistant treasurer or a designated depositary of the United States, in the name and to the credit of such court: *Provided*, That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court.

"§ 996. No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by *the clerk;* and every such order shall state the cause in or on account of which it is drawn."

"§ 5504. Every *clerk* or other officer of a court of the United States who fails forthwith to deposit any money belonging in the registry of the court, or hereafter paid into court *or received by the officers thereof*, with the Treasurer, assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court, or who retains or converts to his own use or to the use of another any such money, is guilty of embezzlement, and shall be punished by a fine not less than five hundred dollars, and not more than the amount embezzled, or by imprisonment not less than one year nor more than ten years, or by both such fine and imprisonment; but nothing herein shall be held to prevent the delivery of any such money upon security, according to agreement, of parties under the direction of the court.

"§ 5505. Every person who knowingly receives, *from a clerk* or other officer of a court of the United States, any money belonging in the registry of such court as a deposit, loan or otherwise, is guilty of embezzlement, and shall be punished as prescribed in the preceding section."

The statutory provisions to which we have referred—taken in connection with section 828 of the Revised Statutes, giving commissions to clerks for *receiving*, keeping and paying out money in pursuance of any statute or order of court—show the relation in which clerks of District and Circuit Courts have always stood to moneys paid into court in pending causes. They manifestly proceed on the ground that money paid into court, under its sanction, may be received by a clerk, his duty upon receiving it being forthwith to deposit the amount with the Treasurer, assistant treasurer, or designated depositary of the United States, in the name and to the credit of the court. As soon as he receives the money he becomes responsible for it under his bond, and that responsibility does not cease until he deposits it as required by law. If after receiving the money he appropriates it to his own use, or, which is the same thing, if he deposits it in

bank to his individual credit, he becomes liable on his bond for the amount so misappropriated.

3. But it is said that the bond in suit having been given to the United States, it must be deemed an instrument for the sole benefit of the Government, and therefore no suit can be maintained on it for the benefit of an individual suitor, although such suitor may have been damaged by the failure of the clerk to discharge his duty. This results, it is supposed, from the fact that there is no statute expressly authorizing such a suit. If this position be well taken, it would follow that the bonds required to be given by clerks of the Federal courts are not in any case for the protection of private suitors. We are of opinion that Congress never intended that any such condition of things should exist, but intended that the bond of a clerk should be for the protection of all suitors, public and private, and to that end authorized his bond to be increased to forty thousand dollars. It is impossible to suppose that, when requiring a clerk to give bond to the United States "faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court," Congress had in mind the interests of the United States alone, and purposely refrained from making any provision whatever for the security of private suitors in the Federal courts. Such a conclusion would be inconsistent with the practice of a century, and would greatly surprise the profession. As may well have been anticipated when those courts were first established, the great mass of litigation in the District and Circuit Courts of the United States has always been between individuals, and consequently the words above quoted, it must be assumed, had reference to individual suitors as well as to the United States. In our opinion, the bond of the clerk is for the benefit of every suitor injured by the failure of that officer faithfully to discharge his duties or seasonably to record the decrees, judgments and determinations of the court. It must have been so understood when the courts of the United States were established and provision made for the appointment of clerks who should be entitled to receive the moneys of suitors when paid into court under its sanction or pursuant to any statute.

A well considered case upon this general subject is that of *McDonald* v. *Atkins*, 13 *Neb.* 568. That was an action on a clerk's bond to recover the amount received by him from a sheriff who had collected it on an execution. The point was made that the clerk was not authorized by statute to accept payment of a judgment, and so the court of original jurisdiction held in that case. The Supreme Court of the State said: "No one can doubt, we think, that this ruling was in direct conflict with the general understanding of the legal profession of this State as to the duty of court clerks in the receipt and disbursement of money paid upon judgments, from the first organization of our judicial system, through all

its changes, down to the present time. Indeed, we doubt exceedingly that any one, especially a practicing lawyer, has ever supposed that upon the rendition of a money judgment, the defendant could not prevent a further accumulation of costs and interests, and have a satisfaction legally entered of record, by at once paying to the clerk of the court the amount which it calls for. If he could not—if clerks are really without authority to receive money on judgments in their custody, then to whom, in the absence of the plaintiff and his attorney, could payment be legally made? While it is true that we have no statute which in express terms declares that the clerks of the several courts shall accept payment of judgments in their custody, it is very evident that the legislature contemplated and intended that they should do so. . . And even in the absence of such provision, can it be doubted that a party against whom a money judgment is sought by action may, upon being summoned, pay the amount demanded 'into court,' and thereby prevent the making of any further costs? But how is it to be effected? In the case of inferior courts—those not of record, and unprovided with clerks—the payment can, of course, only be made to the judge or magistrate in person; but in courts of record, where all the steps taken in the progress of the case, from the commencement to the satisfaction of final judgment, are recorded and preserved, and where a clerk for the performance of this duty is specially provided, it is otherwise. In these courts payments of money are never made to the judge, but the uniform practice in this State has always been to make them to his clerk, to whose custody and care the files, records, and whatsoever else relates to cases in courts, are confided. And this practice, so universal, although not positively directed by any act of the legislature, conflicts with none, and, as we have shown, is recognized by and in perfect harmony with several." These observations are strikingly applicable in the present case.

Two cases often cited in support of the contrary view are *Commonwealth* v. *Hatch*, 5 *Mass.* 191, and *Crocker, Treasurer &c.* v. *Fales*, 13 *Mass.*, 260. These cases will be found, upon examination, to rest upon grounds not applicable here.

Commonwealth v. *Hatch* was a suit upon a bond given by an inspector of beef for the faithful performance of his duties. The suit was brought in the name of the Commonwealth for the benefit of one alleged to have been injured by the unfaithfulness of the inspector in his office. It was held that the action could not be sustained—the decision being placed, in part, upon the ground that it appeared "by the statute directing the bond, and by the bond, that it was given for the *sole* use of the Commonwealth." Surely, it cannot be said that it appears by the statutes and by the bond in the present case that it was given for the sole use of the United States.

Crocker, Treasurer &c. v. *Fales* was an action upon a bond of a clerk in the penalty of $1,000, the obligee being a county treasurer, and the action

being in his name for the use of one claiming to be injured by his neglect to pay certain moneys that came to his hands. The court held that the action could not be maintained, assigning as reasons for that conclusion that there was "nothing in the act" under which the bond was taken showing "a design to protect individual sufferers against the negligence of the clerk to pay over moneys which may come into his hands;" that the penalty—between fifty and three hundred pounds—was discretionary with the court, "the largest of these sums being wholly inadequate if it was intended to cover all possible delinquencies of a clerk;" that the damages recovered by one plaintiff "might consume the whole penalty, and the public be left without any of the security which was intended for the preservation of the records;" and that, in addition, "the statute makes such an appropriation of the sum which may be recovered by the treasurer on a suit as is *wholly inconsistent with the supposition that an individual has an interest in the bond.*" Of course, these things cannot be predicated of the statutory provisions relating to the bonds of clerks of Federal courts, and therefore the case cited is not in point here.

The suggestion that the amount of the bond was insufficient to protect both the United States and private suitors is not controlling; for, by the act of March 3d 1863, *c.* 93, 12 *Stat.* 768, reproduced in section 795 of the Revised Statutes, the court could fix the amount of the bond, and require a new one whenever it deemed proper, and by the act of February 22d 1875 the Attorney General could require a bond for as much as forty thousand dollars.

4. A further contention is, that even if the bond was for the protection of individual litigants, it could not be put in suit by a private person, unless with the consent of the United States expressed in an act of Congress.

It is supposed that the case of *Corporation of Washington* v. *Young*, 10 *Wheat.* 406, 409, is authority for this position. That was an action brought in the name of the Corporation of Washington for the use of one McCue and others, to recover from a manager of a lottery scheme the prize drawn by the purchasers of a certain ticket. The lottery was drawn in pursuance of an ordinance of the Corporation, and the bond of the manager, in the penalty of ten thousand dollars, was conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance." The suit was brought in the name of the Corporation without its previous assent. Upon examination of the record in that case it will be found that the lottery was drawn under an act of Congress, approved May 4th 1812, *c.* 75, amending the charter of the city of Washington, and which gave the Corporation of Washington power "to authorize the drawing of lotteries for effecting any important public improvement in the city which the ordinary funds or revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the

sum of ten thousand dollars; and provided also, that the object for which the money is intended shall be first submitted to the President of the United States, and shall be approved by him." 2 *Stat.* 721, 726, § 6. Chief Justice Marshall, speaking for the court, said: "They [the proprietors of the ticket] had undoubtedly 'a right to apply to the Corporation to direct the suit, and the Corporation could not, consistently with their duty, have refused such application,' if the purpose of the bond was to secure the fortunate adventurers in the lottery, not to protect the Corporation itself. But the propriety of bringing such a suit was a subject on which the obligees had themselves a right to judge. If the proprietors of one prize ticket had an interest in this bond, the proprietors of every other prize ticket had the same interest; and it could not be in the power of the first bold adventurer who should seize upon it, to appropriate it to his own use, and to force the obligees to appear in court as plaintiffs against their own will. No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the Legislature; and no person can be authorized to use the name of another, without his assent given in fact, *or by legal intendment.*"

That case undoubtedly is authority for the proposition that, generally speaking, an obligation taken under legislative sanction cannot, in the absence of a statute so providing, be put in suit in the name of the obligee, the proprietor of the obligation, without his consent. But it also sustains the proposition that consent may, under some circumstances, be assumed to have been given; that is, may arise by legal intendment. In the case just cited it was deemed plain from the ordinance of the Corporation that the bond was taken, primarily at least, for its protection and not for the benefit of ticket holders. The object for which the Corporation was empowered to establish lotteries was in its nature temporary and local, namely, to aid in making important public improvements. It was to secure the accomplishment of that object that the managers were required to execute bond. It was not unreasonable to suppose that in taking such a bond the Corporation had in mind to protect itself in making the public improvements which it was authorized to undertake. In the present case, courts of the United States were established in order that its jurisdiction might be invoked by all entitled to do so, and the requirement that the clerk should execute a bond for the faithful discharge of his duties and for the seasonable recording of the judgments, decrees, and determinations of the court—no distinction being made between public and private suitors—was an assurance to all suitors that, within the limit of the penalty of any bond taken from him by the Government, their rights would be protected against any act or omission on his part resulting to their injury. By the terms of the statute a clerk's bond remained in the custody or subject to the order of the court. In our opinion, Congress intended

that the required bond should protect private suitors as well as the United States, and therefore, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States. Such must be held to be the legal intendment of existing statutory provisions. The United States, or rather the court which had custody of the bond, is to be regarded as a trustee for any party injured by a breach of its conditions.

Murfree in his Treatise on Official Bonds says: "§ 323. It is usually provided in statutes authorizing official bonds to be required of State, county or municipal officers, that suits may be brought upon them in the name of the official obligee 'upon the relation' or 'to the use' of the party injured by the breach of the bond or interested in its enforcement. Whenever, however, this express provision is omitted in the statute itself the deficency is supplied by the construction given to such statutes by the courts whenever a proper case for such a ruling is presented. In a Maryland case (1858), *State, use, etc.* v. *Norwood*, 12 *Md.* 177, 194, the court held that it was not necessary for a plaintiff before instituting a suit upon an official bond payable to the State, to obtain the State's permission to do so; and this although there was in the statute which prescribed the bond no specific provision for making the bond payable to the State, or for giving the party interested the right to sue upon it. The court adds, however, that 'there is no doubt that it is incumbent on the party suing on the bond, to show that he has an interest in it, before he could recover in a regular trial prosecuted to verdict.' The *rationale* of official bonds is well expressed by the court in this case: 'The laws which provide for the execution of bonds similar to the one before us, do not require them for the purpose of protecting the rights of the State alone. They are also designed to secure the faithful performance of official duties, in the discharge of which individuals and corporations have a deep interest, and, therefore, they should have the privilege of suing [on] such bonds for injuries sustained by them, through the negligence and malconduct of the officers.'" The same author: "Many bonds of a strictly official character are executed by persons in places of public trust, prescribed by statute, and made payable to the 'State,' 'people,' or 'commonwealth,' or else to the governor, president or other chief officer, which are designed not only to secure public interests, but to redress wrongs to individuals. Actions on such bonds must, of course, be brought in the name of the obligee, whether the object of the suit be to enforce the rights of the State or to protect private interests. In the latter case it is usual to bring the suit as by the obligee, 'at the relation' or 'for the use' of the real party in interest."

Stress is laid upon the fact that in the case of a marshal of the United States the statute expressly gives a right of action upon his bond to any one injured by his neglect of duty—the suit to be in the name of the party

injured and for his sole use. *R. S.* § 784; 2 *Stat.* 372, 374, *c.* 21. A similar provision is made in the case of consular officers who are required to give bond for the faithful performance of their duties—such suit to be in the name of the United States for the use of the person injured. *R. S.* § 1735. These provisions in relation to marshals and consular officers undoubtedly furnish some ground for the contention that Congress, having made no such express provision in the case of the bonds of clerks, did not intend that private suits should be maintained upon their bonds. We are of opinion that this argument, although not without force, ought not to prevail against the legal intendment of the statutory provisions relating to clerks, who hold a peculiar relation to the courts appointing them, as well as to the public.

As the clerk had the right to receive the money in question; as he failed, to the injury of the suitor from whom he received it, with the sanction of the court in a pending cause, to deposit it as required by law, and appropriated it to his own use; and as his bond was for the protection of private suitors as well as for the Government, there is no sound reason why the plaintiff could not enforce his rights by a suit in the name of the United States for his benefit.

Perceiving no error in the record the judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.